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Manx public law

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MANX PUBLIC LAW

by

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On a final, personal, note, I would like to thank my family for their unfailing support during my seemingly interminable studies.

Much of the material in this text first appeared, often in a radically different form, in the following journal articles:

"The Codification of Manx Criminal Law" (1994) 15 Journal of Legal History 109-130.

"David, Goliath and Supremacy : The Isle of Man and the Sovereignty of the United Kingdom Parliament" [1995] Anglo-American Law Review 1-30.

"Lawyer's Empires : The Anglicisation of the Manx Bar and Judiciary" (1994-5) 19 Journal of the Legal Profession 29-57.

"Doctrinal Effects of Smallness : The Authority of English Decisions on the Common Law in Manx Courts" (1995) 46 Northern Ireland Law Quarterly 34-49.

"Reforming Termination of Pregnancy" [1995] 3 Web Journal of Current Legal Issues.

"The Keys to the Star Chamber: Jury Freedom in England and the Isle of Man" [1993] Lancashire Law Review 33-38.

"The Value of English Authority in Interpreting Acts of Tynwald, and Acts of Parliament Extending to the Isle of Man" (1994) 22 Manx Law Bulletin 106.

"Slow, slow, *slow,slow*,slow: Dancing to the Beat of Europe" (1994) 144 New Law Journal 770.

"Decisions of the Judicial Committee of the Privy Council in Other Jurisdiction: A Note on the Limit of Stare Decisis in Commonwealth Jurisdictions" (1994) 20(2) Commonwealth Law Bulletin 720-727.

"Hard Time for Soft Drugs ?" (1995) 145 New Law Journal 1501.

"The Law and Practice of Capital Punishment in the Isle of Man", (1995) 25 Manx Law Bulletin 49-61.

"Use of Foreign Legislative Models in the Commonwealth: A Case Study of Criminal Legislation in the Isle of Man (1800-1993)", (1996) 21(2) Commonwealth Law Bulletin 671-682.

This text does not generally take account of developments after 31 December 1995. The range of material covered in this text, even with a broad-brush, is considerable, and I welcome comments and corrections.

Peter Edge,
University of Central Lancashire,
Preston,
31 July 1996.

Chapter One: Introduction

Readership.

This text is intended as an introduction for those starting postgraduate study of Manx law, having completed an undergraduate programme containing a substantial proportion of English law. Thus, it should be useful for those undertaking independent research into Manx law as part of a higher degree and, a much larger constituency, articled clerks coming to grips with their new jurisdiction, having completed the academic stages of their legal education in England. Accordingly, the text assumes a certain level of basic knowledge about the English jurisdiction, and English traditions in law-making. The discussion of criminal law and procedure aims to be comparative, seeking to bring out those areas where Manx law and English law may differ, rather than detailing areas of similarity. This Part of the text, in particular, might well appear incomprehensible to those coming from other disciplines, including those with a general interest in Manx culture, rather than Manx law.

It seems sensible, therefore, to suggest supplementary reading for those who do not come from this intended readership, but are still interested in Manx public law. Law text-books have a notoriously short shelf-life, but at the time of writing, the following texts are a useful introduction to the areas covered in each Part.

Part I: M. Zander, The Law Making Process, [London] (1980).

Part II: J.F. McEldowney, Public Law, [London] (1994).

Part III: J.C. Smith and B. Hogan, Criminal Law, [London] (1996).

Aim of the Text.

This text, although arranged in three sections, aims to meet two goals. Firstly, to detail those legal principles, often referred to as constitutional, essential for a good understanding of law in the Manx jurisdiction. Secondly, to detail the principles and sources of criminal law within the Manx jurisdiction. Both of these topics seem to come within a broader *genus* of Public, as opposed to private or civil, Law, although they assuredly do not exhaust that *genus*.

The lack of legal literature available to those studying the Manx jurisdiction is notorious, but less pronounced in relation to constitutional law than in other areas. Because the special status of the Isle of Man is so striking, and of interest beyond the territory of the Island, there

are a number of government reports, and secondary publications, available on this topic. The best general study of the Manx constitution this century remains Kermode's *Devolution at Work*. The perspective this work brings to the Manx constitution is rather different from that study, concentrating primarily on the legal rules governing the creation of law within the Manx jurisdiction. This, literally fundamental, issue casts considerable light on the relationship between different organs within the Manx constitution, and the relationship between the United Kingdom and the Island. It is also of considerable importance to those seeking to know, and make use of, Manx law.

While constitutional law has often been the subject of discussion, the purely internal law of the Island is less well documented. This text seeks to describe the criminal law of the Isle of Man in some detail by drawing upon a wide range of Insular sources, both historical and current. There would be little point in reproducing the excellent analysis of any of the range of textbooks on English criminal law where Manx and English criminal law are identical, so the emphasis is on areas of difference, and providing references to sources for further study on matters of detail.

Arrangement of Materials.

Part I of this text deals with the Manx legal system. The primary concern is the sources of law within the Manx constitution - a more complicated issue than might appear at first glance. The most potent source of law within the Manx constitution is legislation, and the range of different bodies capable of creating primary legislation within the Isle of Man is explored at length, especially the authority of the United Kingdom Parliament in the Island. The authority of judicial precedent in the Island is also considered at some length, with especial emphasis upon the value of English precedents in the Manx courts. This part concludes with a discussion of some less important sources of law, and other materials relevant to the study of Manx law.

Part II of the text deals with the Manx constitution in broader terms. After a general discussion of the intricate constitutional history of the Island, emphasis shifts to the external relations of the Island. Once again, discussion concentrates upon the legal rules governing these relations, rather than other factors of considerable practical importance such as economic ties. The internal constitution is considered in the light of the theory of the separation of powers between the legislature, executive, and judiciary.

Part III of the text moves on to discussion of Manx criminal law. An initial section discusses one of the most distinctive, and influential, features of Manx criminal law; the early moves to codify Manx criminal law along English lines. After a brief discussion of criminal procedure, including the criminal courts, the different classes of criminal offence are discussed. This part concludes with a discussion of punishment of offenders.

On the whole, this Part is more narrative than the rest of the text, and relies heavily upon extensive references in the foot-notes rather than detailed discussion in the text. In a few areas, however, there seem to be real points of interest which may not be accepted as readily as the rest of the text. Accordingly, these issues are discussed at the end of the relevant chapters, for instance the discussion of attempted manslaughter at the end of Chapter Twelve.

Although not intended to develop a particular thesis, this text can be read from start to finish. It would probably be more appropriate, however, to read Part I in that way, and use the later parts of the text, especially Part III, as reference material. Subheadings and an index are provided as aids.

Part I: The Manx Legal System.

Chapter Two: The Jurisdiction.

Many texts are available discussing the geographical, economic, and demographic characteristics of the Island. This chapter is, instead, concerned with the legal characteristics of the Manx jurisdiction - firstly, the legal status of the jurisdiction; secondly, the geographical extent of that jurisdiction.

The Legal Status of the Isle of Man.

It is accepted by the Manx and English courts that the Isle of Man has never been part of England ¹. Although a distinct realm, the Isle of Man is a dominion of the Crown ². The jurisdiction of the Privy Council, exercised both before and after Revestment ³, clearly indicates this ⁴, as does the exercise of a jurisdiction by the English authorities over the Manx Crown during succession disputes ⁵. The exact date of the entry into the dominions of the Crown, and the nature of that entry, is less clear.

The Entry of the Isle of Man into the Crown's Dominions.

In *ex parte Brown* ⁶, an English court held that the Isle of Man was not a foreign dominion under 25 & 26 Vict. c.20 as “The Isle of Man has always been in feudal subjection to the Crown of England, although not immediately under the Crown, because it had a King of its own”. Insofar as *ex parte Brown* purports to describe the constitutional history of the Isle of Man, it is inaccurate ⁷. The Isle of Man was clearly held, as of right, by foreign powers more recently than 1189 ⁸. Thus, it is not possible to take the view that the Isle of Man was always a possession of the English Crown. Accordingly, the manner by which the Isle of Man acquired that status should be discussed ⁹.

¹From a range of authorities, see *Re C.B. Radio* [1981-3] Manx L.R. 281; *Calvin's Case* (1608) 1 Co.Rep. 1a; *Davison v Farmer* (1851) 6 Exch. 242; cp. *NGI v Rignose* [1962] 1 W.L.R. 183.

²But not a British possession - see Lieutenant-Governor Loch to Under-Secretary of State, 18 November 1880 [Letterbooks 36,446].

³See p.41.

⁴See also *ex parte Brown* (1864) 5 B & S 279.

⁵See p.41.

⁶*ex parte Brown* (1864) 5 B & S 279.

⁷See YOUNG G.V.C., Subject Guide to the Acts of Parliament Relating to the Isle of Man 1350-1975, [Douglas] (1978) 13.

⁸See p.105.

⁹See ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 23-29.

Title to an existing territory can be obtained in four ways - by settlement ¹, annexation, cession ², or conquest ³. In their submission to the Kilbrandon Commission the Home Office and the Foreign and Commonwealth Office avoided determining how the Isle of Man had been acquired: “Finally, the English claim prevailed, although there was no formal annexation to the English Crown, still less conquest or cession” ⁴.

The key period for determining this question is between 1304, when the Island was clearly in the possession of the Scots Crown, and 1405 ⁵, when the Manx crown was held by feudal service, the Isle of Man remaining within the English Crown dominions. There was no possibility of acquisition by annexation, as the Isle of Man belonged to another nation before this period ⁶; of settlement, since there was already an established system of government in the territory, and no obvious pattern of displacement by a new population ⁷; or of cession, since no treaty ceded rights over the Isle of Man. It remains to identify an event constituting conquest.

In 1305, Aufrica de Connaught, who claimed the Manx Crown through the Norse line, made over her rights to Sir Simon de Montacute, who was probably her husband. By 1306 Sir William de Montacute had conquered the Isle of Man. Between 1307 and 1333 the English Crown dealt with the Isle of Man as Sovereign ⁸, and it could be argued that the Isle of Man entered the Crown dominions in 1306, with the conquest by Sir William de Montacute. In 1333, however, Edward III executed a document which, while arguably a mere recognition of the Norse title of the Montacutes, appears to have renounced Sovereign rights over the Isle of Man, and thus excluded the Island from the Crown dominions:

“The King to all to whom these presents may come, greeting. Know ye, that by the consent of the Prelates, Lords, Barons, and other nobles, our assessors, that we have remitted,

¹See Attorney General of Honduras v Bristowe (1880) 6 App.Cas. 143; FARRANT R.D., The Isle of Man in International Law, [Douglas] (1937) Chapter 2.

²See Amodo Tilani v Secretary of Southern Nigeria [1921] 2 A.C. 399; Hoani te Heuhue Tukino v Aotea District Maori Land Board [1941] A.C. 308; Okeyan v Adele [1957] 2 A.E.R. 782; Sammut v Strickland [1938] A.C. 678; Re Southern Rhodesia [1919] A.C. 211; In Re C.B. Radio [1981-3] Manx L.R. 399; Manx Society 7,25; Manx Society 7,176.

³See The Foltina (1814) 1 Dods. 1450; Re Southern Rhodesia [1919] A.C. 211; Manx Society 7,180; ROBERTS-WRAY K., op.cit., (1966) 107.

⁴Kilbrandon Report, (1973) Minutes of Evidence 6,18.

⁵See p.112.

⁶See p.110.

⁷See p.107.

⁸See GELL J., "Notes on the Supposed True Chronicle of the Isle of Man", Manx Society 12,19-21.

surrendered and altogether on our part, and that of our heirs, assigned peaceful possession to our beloved and faithful William de Montacute, of all the rights and claims which we have, have had, or in any way could have, in the Isle of Man, with all its appurtenances whatever; so that neither we nor our heirs, nor any other in our name, shall be able to exact or dispose of any right or claim in the aforesaid Island” ¹.

The grant was unlimited in time, made no provision for revocation of the rights of the Lord of Man, and made no provision for feudal service to the English Crown. If a subject may hold absolute title to a territory despite their subjection to the English Crown, it would seem that, after a brief period in the Crown dominions, the Island left the dominions in 1333.

William le Scroop purchased this title, and was later executed by Henry IV, who granted the Isle of Man to the Earl of Northumberland. The terms of the grant repeatedly emphasised that Henry IV based his authority to deal with the title over the Isle of Man upon the conquest of William le Scroop, and that the grant to the Earl of Northumberland was conditional upon feudal service ².

The mere decree of the Crown and Parliament that a given territory has been taken by conquest does not make that a historical fact ³. Nonetheless, it appears an accurate description of the process by which an absolute ruler of a territory was taken and executed, his territory falling to the person who ordered his death. It would thus appear that by 1399 at the latest the Isle of Man had entered the dominions of the Crown and, by reservation of service in grants after that date, remained within those dominions thereafter ⁴.

The Legal Effect of Revestment.

The most radical change in the status of the Island after it entered the dominions of the Crown might be thought to be the Revestment of 1765 ⁵. Despite the enormous practical effects of Revestment, however, the Revestment Act of 1765 made no radical alteration to the constitutional position of the Isle of Man. 5 *Geo. 3 c.26 s.1* provides that:

“the said Island, castle, pele and lordship of Man, and all the Islands and Lordships to the said Island of Man appertaining, together with the royalties, regalities, franchises, liberties, and sea ports to the same belonging ... shall be, and they are hereby unalienably vested in the his Majesty, his heirs and successors”

¹7 Edw. 3 (1333) Manx Society 12,22.

²1 Henry IV (1399) Manx Society 12,23-4.

³GELL J., *op.cit.*, Manx Society 12,25-6.

⁴For other grants, see 5 Henry 4 c.1 (1404); 7 Henry 4 (1406), Manx Society 12,26-30. If the better view is that no subject could hold an absolute Crown, then the correct date for entry is 1306, but the method was still by conquest.

⁵ See p.9.

The Revestment Act was not an Act of Union between Great Britain and the Isle of Man. Rather, it vested a legal entity - the Lordship of the Isle of Man - in a natural person - the then British Sovereign and his heirs. This did not affect a change in the constitutional status of the Isle of Man *per se*.

The Isle of Man as Part of Empire and Commonwealth.

The final point to discuss concerning the legal status of the Island is how it fits into the broader legal context of British Empire and later British Commonwealth. It would be unwise to treat the Isle of Man as simply another dominion of the British Crown, subject without qualification to the rules which developed to govern the dominions of the British Empire. The point is well made by Roberts-Wray:

“though the relationship between the United Kingdom and the [Isle of Man and Channel Islands] involves some [of the general principles], particularly the Royal Prerogative and the Sovereignty of Parliament, it remains true that ... the connection of both the Channel Islands and the Isle of Man with the United Kingdom is historically unique, and the constitutional position of each is *sui generis*”¹.

The Home Office have acknowledged that the proximity of the Isle of Man and the Channel Islands to the United Kingdom², and the antiquity of their association with the Crown places them “in a category apart from all other British Dependencies”³. It had also been suggested that the special defence and ethnicity factors of the Isle of Man distinguished it, in practice, from the other territories⁴. Finally, the legislature of the Island derive their authority from insular law, rather than an Act of Parliament⁵. These features provide sufficient justification for treating the Isle of Man as, at least potentially, *sui generis* within the British dominions.

These arguments would appear to group the Isle of Man and the Channel Islands. While there is no doubt that the factors affecting the legal development of the Islands were very similar, the Isle of Man and the Channel Islands were very different - the Channel Islands became dependencies, not because an English Sovereign acquired title, but because they were part of the dominions of the Duke of Normandy in 1066 when he acquired England by conquest⁶. Similarly, while both areas retain distinctive laws, the roots of the two are very different⁷.

¹ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 139.

²See Grey to Lieutenant-Governor Hope, 19 January 1847 [Letterbooks 5,176].

³Kilbrandon Report, (1973) Minutes of Evidence 6,7.

⁴See Kilbrandon Report, (1973) Minutes of Evidence 6,45 per Kerruish H.C..

⁵See Lieutenant-Governor Loch to Home Office, 9 August 1873 [M.M.A. GO 23/20].

⁶ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 672-77.

⁷ See, briefly, D.G. KERMODE, 23.

Principles drawn from the other jurisdictions within the British dominions, therefore, should be borne in mind when discussing Manx law, but not treated as *ipso facto* decisive.

The Boundaries of the Jurisdiction.

The Manx jurisdiction includes the entire geographical area of the Isle of Man. As well as the land territory of the Isle of Man, the Manx jurisdiction extends into territorial waters. The development of the territorial waters of the Isle of Man has been complex as, apart from the international developments in this area, the situation is further complicated by agreements of the European states, and between the Manx and United Kingdom governments.

In summary, since 1990 the territorial waters of the Isle of Man have extended to twelve miles, or to the agreed median line where Manx territorial waters would overlap with those of a neighbouring jurisdiction ¹. Relevant Manx legislation applies to this territory ².

¹ Order made under Territorial Sea Act 1987.

² Territorial Sea (Consequential Provisions) Act 1990, Double Taxation Relief (Territorial Sea (Consequential Provisions)) Order 1991 (GC 248/91).

Chapter Three: Sources of Law - Legislation.

The highest form of law in the Manx jurisdiction is legislation - whether from the insular legislature, Tynwald, or from Parliament. This chapter considers the authority, and application, of legislation within the Manx jurisdiction. The composition of Tynwald is considered elsewhere ¹.

Acts of Tynwald.

What constitutes an Act of Tynwald is now clearly established, as is discussed in the section below on legislative process. Before the seventeenth century, however, not all purported legislation came from the Keys, Council, Governor and Lord ², but instead was “prescribed by such different powers or combinations of powers that, as precedents of the exercise of the legislative authority, they can have but little weight” ³. In 1978 the status of many of these ordinances was clarified by statute ⁴, but it is important to consider the contemporary status of these ordinances. Rather than adopt an overly legalistic view of the ordinances, each is treated as having effected legal change at the time of enactment, but any flaws in the source are noted in the footnotes.

The most difficult issue is not what constitutes an Act of Tynwald, but rather the limits of the legislative capacity of Tynwald. This section discusses the legislative power of Tynwald, the process by which this power is exercised, and the influence of Parliamentary models upon Manx legislation. This section concludes with a discussion of how to find Acts of Tynwald.

The Powers of Tynwald.

As a general principle, Tynwald “may make, restrain, abrogate or revive any Insular law, and all mischiefs and remedies are within [its] reach” ⁵. The next section establishes that Tynwald has legislated against Acts of Parliament ⁶. Two possible limits may, however, apply to the

¹ See p.135.

² See p.14.

³ Report of the Commissioners of Inquiry for the Isle of Man, [Douglas] (1792) 67.

⁴ Pre-Revestment Written Laws (Ascertainment) Act 1978.

⁵ JOHNSON J., Jurisprudence of the Isle of Man, [Edinburgh] (1811) 19.

⁶ cf. Lieutenant-Governor Loch to Under-Secretary of State, 4 April 1876 [Letterbooks 29,508].

authority of Tynwald. As this is such a fundamental point, they are worth discussing, although neither seems well-founded.

Firstly, repugnance to English law. At one time, it was believed that Imperial law restricted the powers of dominion legislatures. It later became clear that these restrictions were based, not upon general principle, but upon the terms of the instrument empowering the legislature¹. Since Tynwald derives authority from Manx customary law, those restrictions do not apply.

It may be argued by a different route, however, that Tynwald has no power to legislate contrary to the fundamental principles of English law. *Picton's Case*², while not discussing the situation in the Isle of Man, laid down a general principle which may apply to the Isle of Man. Lord Ellensborough directed the jury that they should consider, in relation to a putative state's power to torture:

“whether when an Island is ceded to British arms, a species of punishment - a mode of investigating the truth so utterly inconsistent with the constitution and laws of Great Britain, and with the habits of its people, is virtually abrogated; and whether His Majesty in continuing the former laws of the country must not be considered as doing so with the exception of the power to inflict torture”

It could be argued that for a legislature to be able to authorise torture is equally contrary to the basic principles of English law, and is therefore abrogated on the entry of the territory into the Crown dominions. Thus, Tynwald could not legislate contrary to the basic tenets of English law. This restriction should be read very narrowly, and it is difficult to suggest a realistic scenario where Tynwald might be hampered by it. Also, there are serious doubts as to whether it applies to the Isle of Man. The recent developments in relation to parliamentary authority suggest that the rule applies, at best, in modified form. It was not suggested in *Picton* that Parliament could not authorise torture, and such a limit on Parliamentary authority would be untenable. As is discussed below, Tynwald appears to enjoy a coordinate authority with Parliament, and thus might be expected to have a similar power to authorise torture. Therefore, it seems improbable that this possible restriction applies to Tynwald.

Secondly, repugnance to international law. At one time it was unclear whether dominion legislatures, other than Parliament, possessed the power to legislate contrary to international

¹ See *Riel v Rigg* (1885) 10 App.Cas. 675.

² *Picton's Case* (1804-12) 30 St.Tr. 225 at 864-5.

law by, for instance, legislating for other countries ¹. It appears that, once again, such a limit derived from the document empowering the legislature, and so cannot apply to the Isle of Man ².

Tynwald may, however, be unable to legislate on matters which transcend Manx frontiers, thus being unable to legislate so as to bring the Crown into breach of its international obligations. The argument for such a limit relies upon the legislative power of the Crown surviving in the Isle of Man after 1866, a point which is discussed elsewhere. In *Cameron v Kyte* ³ the mode of exercising this power was considered and it was noted, albeit as very weak *obiter dicta*, that:

“We do not say that the King’s will, intimated by the Secretary of State for the Colonies might not be operative.”

In 1957, the Secretary of State with responsibility for the Isle of Man stated that Tynwald was limited to legislating on matters which did not transcend the Manx frontiers ⁴. It could be argued, therefore, that the power of Tynwald to legislate has been curtailed since 1957.

Once again, this restriction probably does not apply to Tynwald, if only because Tynwald can legislate coordinate with ⁵, or more probably superior to, the Crown; so any attempt to legislate against this limitation would, by implication, repeal it. In any case, it is unlikely that the courts would interpret a speech, better seen as a statement of political practice, as a legislative act, particularly where the territory is at peace and possesses civil government ⁶.

Legislative Process.

This section considers initiation of a Bill, its drafting and journey through the Manx legislature, and finally the process by which Assent is given to the Bill.

¹ See VANEK D.C., “International Law and the Law of Canada”, (1949-50) 8 Toronto Law Journal 251; CLAYDON J., “The Application of International Human Rights Law by Canadian Courts”, (1981) 30 Buffalo Law Review 727.

² See *Worth v Worth* [1931] NZLR 1109 (New Zealand Court of Appeal); *Croft v Dunphy* [1933] AC 156 (Privy Council on Appeal from Supreme Court of Canada).

³ *Cameron v Kyte* (1835) 3 Knapp. 332.

⁴ See R.A. Butler, November 21 1957. 577 H.C. Debates 1185.

⁵ *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381.

⁶ *Ruding v Smith* (1821) 2 Hag.Con. 371; *Cameron v Kyte* (1835) 3 Knapp 332.

The impetus for a Bill normally comes from the executive of the day, although private members of either Branch, or even non-members, of the legislature can also initiate Bills. Even where a Bill is initiated by the legislature, the original suggestion for the Bill may come from some other body ¹. Even where the idea for a Bill comes from outside the executive, the executive chooses which Bills are given priority, and often detail the first draft of the Bill.

Before 1949 the Attorney General bore sole responsibility for drafting the proposed Bill ². This could cause problems, as the Attorney General had many duties, was often absent from the Isle of Man for long periods of time ³, and in any case lacked the perspective of working as part of a team ⁴. In 1949, after complaints about the quality of drafting in Manx statutes, funds were made available for a legal assistant to provide aid to the Attorney General ⁵. By 1990, with the development of an insular central government, the Chief Minister could describe drafting in the following terms:

“The Bills included in the legislative programme that is approved by the Executive Council are drafted in the Attorney General's Chambers in consultation with the department which is promoting the Bill or is most closely concerned with the subject matter of the Bill” ⁶

Either before, or during, the passage of the Bill, it is considered by the financial watchdog ⁷. After Revestment, Tynwald had limited control over finances and the United Kingdom Treasury expected to receive copies of all Acts involving expenditure before they were sent for Royal Assent ⁸. Between 1866 and 1961 the financial liberty of Tynwald increased ⁹.

¹For a striking historical example, see [1842] *Mona's Herald* 12 July.

²See Lieutenant-Governor to Secretary of State, 7 May 1796 [H.O. 98/65].

³eg. Lieutenant-Governor Loch to Waddington, 3 July 1865 [Letterbooks 11,176]. As a stop-gap, a Deemster could undertake drafting in the absence of an Attorney General but the problem of one official drafting a Bill remained - see Lieutenant-Governor Loch to Under-Secretary of State, 27 October 1868 [Draft - Manx Museum G.O. 5/4].

⁴See ZANDER M., *The Law-Making Process*, [London] (1989) 11.

⁵Meeting with the Law Officers, 2 May 1949 [H.O. 45/22981/567948].

⁶(1990) 14 *Manx Law Bulletin* 22.

⁷In the case of Bills involving heavy expenditure prior discussion was often to be preferred - see Lieutenant-Governor Walpole to Secretary of the Treasury, 20 October 1891 [Letterbooks 85, 51]. The current practise is for Government Bills to be discussed by the Treasury before entering the Council of Ministers for consideration. Private Bills will be queried if financial implications have not been discussed in advance.

⁸Lieutenant-Governor Ready to Secretary of State, 29 May 1840; Treasury to Secretary of State, 25 February 1935 [H.O. 45/22981/567948]. No watchdog seems to have existed before 1765.

⁹D.G. KERMODE, 31-56.

Since 1961 all Bills involving public expenditure have been submitted to a financial watchdog for concurrence before introduction into either Branch of Tynwald - initially the Lieutenant-Governor and Finance Board ¹, later the Finance Board alone, and then the Manx Treasury ². A Bill cannot proceed without the concurrence of this watchdog ³.

Consultation may also have taken place with the organs of the British Government ⁴, principally the Home Office, although other bodies, such as the Office of Woods, have also considered legislation ⁵. By 1796, before the explosion of legislation after 1800 ⁶, the Lieutenant-Governor was consulting the Home Office on Bills which were considered contentious ⁷. While communications in the twentieth century have occasionally broke down ⁸, informal Home Office comments are often perceived as very useful ⁹. The British officials consulted could not claim to possess specialist knowledge of the Isle of Man ¹⁰ but insular officials could furnish advice where required ¹¹.

Moving onto legislative discussion, the draft Bill next enters one of the two Branches of Tynwald. Until the transfer of executive government from the Council, the practice was "for most government Bills to originate in the Council. With the Attorney General in that Branch

¹Isle of Man Constitution Act 1961 s.11.

²Treasury Act 1985 s.10.

³D.G. KERMODE,132.

⁴See (1990) 14 Manx L.B. 22.

⁵eg. J.Howard to Lieutenant-Governor Hope, 22 February 1858 [Letterbooks 8,275].

⁶See p.21.

⁷See Lieutenant-Governor Shaw to Secretary of State, 1 March 1796 [H.O. 98/65]; Lieutenant-Governor Loch to Under-Secretary of State, 24 January 1871 [Letterbooks 18,107]; D.G. KERMODE D.G., 133-4; Howard, Office of Woods, to Lieutenant-Governor Loch, 13 February 1874 [Letterbooks 24,534]; Lieutenant-Governor Walpole to Office of Woods, 6 April 1890 [Letterbooks 1890-1,62]. A notable, but singular, exception can be found in Home Office to Lieutenant-Governor Smelt, 10 April 1824 [H.O. 99/17].

⁸eg. H.O. 45/13003/442276.

⁹See debates on the Bail Act 1952 (4 March 1952 [Debates 69,225]); Genocide Act 1969 (29 April 1969 [Debates 95,1596]); Coinage Offences Act 1980 (13 November 1980 [Debates K145]).

¹⁰See Law Officers to the Home Office, 28 February 1872 [H.O. 45/9319/16550]; Home Office to Lieutenant-Governor Shaw, 14 January 1797 [H.O. 98/65]; Law Officers to the Home Office, 5 October 1948 [H.O. 45/22981/567948].

¹¹See Law Officers to Home Office, 19 July 1931 [H.O. 45/22981/567948]; Attorney General to Law Officers, 14 February 1870 [H.O. 45/9343/23542]; Home Office to Lieutenant-Governor Loch. 4 February 1871 [M.M.A.].

this [was] no doubt a convenient course" ¹. Since 1960, however, with the shift in the emphasis of the constitution from the Council to the Keys, most Bills originate with that body. The composition of the Council and Keys is discussed elsewhere ².

An Act of Tynwald has never been valid without the consent of the House of Keys, although some ordinances before Revestment were enacted without this consent, or with a flawed consent ³. The position of the Council is more complicated. Before 1961, the consent of the Council was necessary to any Act of Tynwald ⁴. In that year, by an Act of Tynwald implementing many recommendations of the M'Dermott Commission ⁵, the consent of the Council became optional. Section 10(1) of the Isle of Man Constitution Act 1961 provided

"If any Bill is passed by the Keys and rejected by the Council in two successive sessions and is passed by the Keys in the next ensuing session and having been sent up to the Council at least three months before the end of such last-mentioned session, is not then passed by Council within two months of having been sent up, such Bill shall notwithstanding anything contained in the Standing Orders of Tynwald be placed on the agenda of the first convenient sitting of Tynwald for signature. Provided that a Bill to amend the Isle of Man Constitution Acts 1919-1961 shall not be deemed to have been passed unless it shall have received at least sixteen votes in favour of the third reading thereof in that session" ⁶.

The period of delay was reduced from two years to one year in 1978 ⁷. Thus, since 1961 it has been possible for the House of Keys to override the Council in some circumstances.

The two Branches then meet together, in a body often referred to as Tynwald Court, to sign the Bill. This is not a mere formality as, if the Bill is not signed by a majority of each Branch, it will not proceed to Assent ⁸. Additionally, before 1990 the Lieutenant-Governor, as a separate estate, had a discretion to withhold his signature from the Bill, in which case it

¹Report of the Commission on the Isle of Man Constitution, [Douglas] (1959) 36.

²See p.135.

³See p.12.

⁴[1871] *Mona's Herald* 8 November.

⁵See p.119.

⁶Isle of Man Constitution Act 1961 s.10(1).

⁷Isle of Man Constitution Act 1978.

⁸eg. Licensing Amendment Bill 1973.

would fail ¹. The President of Tynwald, who replaced the Lieutenant-Governor in 1990, does not possess this veto ².

As an aside, it may be that the Lieutenant-Governor in the nineteenth century was considered to have some unilateral power to change the Bill after it had passed through the above stages. The only support for such a power can be found in correspondence between Lieutenant-Governor Loch and the Home Office in 1892. Three Acts of Tynwald sent for Assent had been returned without Assent. Loch indicated that he was willing to correct "verbal errors" in the Acts but "did not like striking out a clause agreed to by the legislature without consulting it" ³. While it may be that the Lieutenant-Governor possessed some ministerial power to correct spelling mistakes in documents sent to the Crown, it is unlikely that any wider power existed. Certainly, the legislative history of the two Codes does not indicate the existence of such a power ⁴.

After the Bill is signed, it is passed to the Lord for Assent. "Prior to 1765 the legislative power was exercised by the King or Lord of the Isle of Man without reference to the Crown of England" ⁵, but after Revestment the power of assent lay with the English Sovereign in their "capacity as Lord of Man" ⁶. In practice, this decision was not made by the Sovereign personally, but rather by the British executive. The Home Office decided whether or not to forward a Bill for Royal Assent, although it often involved other bodies in the decision making. Even where the Home Office supported the Bill, assent could still be refused. After 1813 Assent was considered formally by the Privy Council, and after 1910 by a specialist committee of the Privy Council ⁷. The Crown was, under the extra-legal rules of the British Constitution, obliged to take the advice of the executive ⁸. In 1981, however, the form, if not the substance, of Assent underwent a radical change.

¹Consider GELL J., The Constitution of the Isle of Man, [London] (1881); KERMODE D.G., "Legislative-Executive Relationships in the Isle of Man", (1968) *Political Studies* 16; First Interim Report of the Select Committee of Tynwald on Constitutional Issues, [Douglas] (1978).

²Constitution Act 1990 s.1-6. Consider also the Deemsters, who, while required to sign all Bills, were unable to veto a Bill which otherwise had been passed by Tynwald.

³Lieutenant-Governor Walpole to Under-Secretary of State, 14 June 1892 [Letterbooks 1891-3,434].

⁴See p.165.

⁵RING G.A., "The Legislature and Judicature of the Isle of Man", (1902) *Law Magazine and Review* 27.

⁶Kilbrandon Report, (1972) minutes 6,21-22 per Home Office and Tynwald.

⁷CAIN T.W., "Royal Assent to Acts of Tynwald", (1992) 19 *Manx Law Bulletin* 113.

⁸Kilbrandon Report, (1972) para. 1361.

As a result of pressure from the insular authorities ¹, the Lieutenant-Governor was empowered, by an Order in Council ², to assent to certain classes of Bill on behalf of the Crown. Subject to two provisos, the Lieutenant-Governor was empowered to assent to any Bill. The Lieutenant-Governor was required to reserve for the Crown's pleasure any Bill he considered should be so reserved, or was required to reserve by the Secretary of State. The Lieutenant-Governor was directed to consult with the Secretary of State on any bill dealing with : defence, international relations, nationality and citizenship, the Lieutenant-Governor, the relationship between the Isle of Man and the United Kingdom, the Sovereign personally, or the Royal Prerogative. In practice, however, the Lieutenant-Governor does not act as independently from the Secretary of State as may be imagined. In 1990 the Chief Minister described the process after the Bill had been signed in Tynwald:

“it is considered by His Excellencies Royal Assent Advisory Committee in order to advise as to whether his Excellency should recommend that the Royal Assent should be reserved or not. Immediately thereafter the Bill is despatched to the Home Office together with the Lieutenant-Governor’s certificate relating to the reservation or not of the Royal Assent and the Attorney General’s certificate as to the nature of the Bill and *any amendments to the Bill made by the Branches during its passage. Confirmation is then awaited from the Home Office* that it is in order for the Lieutenant-Governor to announce the Royal Assent.”

³

Two points made in this passage need emphasising. Firstly, the reference to amendments made after the Bill entered the Branches underlines the importance of the earlier consultations with the Home Office, which would have had the opportunity to order reservation of controversial legislation ⁴. Secondly, the “confirmation” of the Home Office is required before the Lieutenant-Governor will publicly assent to the Bill.

Between 1981 and 1992 only six Bills were reserved for Royal Assent and, in the opinion of the Attorney General, "it is likely that the reservation of Bills for the signification of Her Majesty's pleasure will continue to be very unusual" ⁵. At the time of writing, it seems that reservation of Assent has become, if anything, even more unusual ⁶

¹Lieutenant-Governor, 6 September 1939 [H.O. 45/22981/567948]; First Interim Report of the Select Committee of Tynwald on Constitutional Issues, [Douglas] (1978).

²Royal Assent to Legislation (Isle of Man) Order 1981.

³(1990) 14 Manx Law Bulletin 22. The emphasis is mine.

⁴See p.16.

⁵CAIN T.W., "Royal Assent to Acts of Tynwald", (1992) 19 Manx Law Bulletin 113.

⁶ The Islands Section of the Constitutional Division of the Home Office confirmed to me on 18 June 1996 that such reservation was very rare and, although they did not keep statistics, they could recall only one instance of an Act being reserved - the Transfer of Governors Functions Act 1992.

After Assent the Bill did not, by customary law, become law until it had been promulgated ¹. A Bill was, by customary law, promulgated by being read in full ², in both English and Manx, from Tynwald Hill ³. Typically, Bills would be read out at the ceremonial meeting of the Manx government, the Tynwald Day. This was not a legal requirement, although by the nineteenth century Lieutenant-Governors showed a reluctance to promulgate Acts outside Tynwald Day ⁴. The amount of information to be read out was reduced in 1865 ⁵, and 1895 ⁶. Since 1916 an Act will become law on Assent although, unless promulgated within a statutory time limit, it can later lapse ⁷.

Adoption of Parliamentary Models by Tynwald.

While Tynwald is capable of producing its own legislation on its own lines the tendency of Tynwald to enact legislation identical, or very similar, to Acts of Parliament not extending to the Isle of Man has been of considerable importance. This section discusses the pattern of Manx legislation, in particular in relation to criminal law and procedure, and considers the factors causing Tynwald to adopt Acts of Parliament ⁸.

The following discussion does not distinguish between different forms of adoption, but it is worth outlining the forms at this point. The most important is the copying of text, with or

¹Acts of Parliament applying to the Isle of Man did not need to be promulgated. cf. J.K. Grieg to Lieutenant-Governor Loch, 26 September 1876 [Letterbooks 31,46].

²No official had legal responsibility for this - see Attorney General Gell to Lieutenant-Governor Walpole, 23 June 1883 [Letterbooks 38,627].

³It is worth stressing that the Bill did not *become law* until promulgated. Promulgation *was not* analogous to a declaration under an appointed day order bringing sections of the Act of Tynwald into effect.

⁴See the correspondence regarding the second Code, p.165. A consideration of promulgation between 1700 and 1800 indicates that Tynwald Day was preferred but not essential. Between these dates two Acts were promulgated in February; three in April; one in May; thirty-eight in June; seventeen in July; one in August; twenty two in September, seventeen of which were promulgated at the same time; three in October; and two in November. Taking into account the postponement of any Tynwald day which fell on a Sunday, and the adoption of the Gregorian Calendar during this period, of the eighty-nine Acts promulgated during this period, forty-six were promulgated on Tynwald Day.

⁵Promulgation Act 1865 s.1.

⁶Promulgation of Acts Act 1895 s.1.

⁷Tynwald (Emergency Promulgations) Act 1916 s.2,3; Promulgation Act 1988; Constitution Act 1990 s.7. See generally, BOYD M.E., "Promulgation of Acts of Tynwald", (1987) 9 Manx L.B. 62.

⁸It is worth noting that Manx statutes have been influential in other jurisdictions, and that Parliament is not the only body whose statutes have been taken as a model for Manx legislation - see for instance Limited Liability Companies Bill 1996. Nonetheless, the far commoner, and more important, process is that discussed in the text.

without alteration, from an Act of Parliament. Although late twentieth century statutes ¹ often acknowledge the derivation in a side-note ², the statute is as printed in the Manx statute books. The other forms, of lesser importance, make the link with the Act of Parliament more express. An Act of Tynwald can "extend" the provisions of an Act of Parliament to the Isle of Man, by which it adopts, without reproducing, the text of the statute ³. Alternatively, it can give an insular official the power to do the same, with or without alteration ⁴. The three forms do not differ significantly in effect ⁵.

The only area where adoption of English forms has been studied is that of criminal law and procedure ⁶. Much of the discussion which follows is based upon the specific research into that area. It seems likely that many of the points raised here are applicable to most other areas of Manx legislation, but it is worth noting that criminal law and procedure has been simultaneously an area based on English law for a considerable period, and one of relatively little interest to the United Kingdom authorities. Thus, it may be that the dichotomy between strong adoption and weak coercion is stronger in this area than many others. Nonetheless, some insights can be gained even from this single area.

¹The earliest is the Children and Young Persons Act 1949.

²Such acknowledgement should, probably, not be considered when interpreting the statute, *per* Phillimore L.J. in *Re Woking Urban Council (Basingstoke Canal) Act 1911* [1914] 1 Ch.300 but the special circumstances in the Isle of Man may justify judicial recognition of the acknowledgement.

³eg. Elementary Schools (Superannuation) Act 1913.

⁴eg. Social Security Act 1982 s.1(1).

⁵ See p.21.

⁶ See Edge P.W., The British Influence Over the Making of Manx Criminal Law and Procedure, 1765-1993, (Unpublished Ph.D. Thesis, Cambridge University: 1994).

It is possible to show the increasing pattern of adoption of Acts of Parliament by a tabular representation of Manx legislation in this area between 1800 and 1992. Before 1800 only fifty sections relating to criminal law and procedure had been enacted by Tynwald, of which only two were modelled on an Act of Parliament. Given the time scale, little more can be said other than, insofar as Tynwald was important during this period, adoption of Acts of Parliament was not. Consideration of the pattern after 1800 is more enlightening.

Table One: Adoption of English Statutes 1800-1992.

Date	Sections	Adopted	%	Date	Sections	Adopted	%
1800-1819	61	12	19.7	1900-1919	203	174	85.7
1820-1839	32	11	34.4	1920-1939	433	320	73.9
1840-1859	21	15	71.4	1940-1959	663	592	89.3
1860-1879	626	422	67.4	1960-1979	1102	985	89.4
1880-1899	177	100	56.5	1980-1993	2499	1865	74.6

Before summarising and discussing these findings, it is useful to consider weaknesses in the purely numeric approach. Firstly, it fails to weight provisions of especial importance. Secondly, it fails to consider differences in drafting style over time. Early statutes tended to lay down important legal rules in a very small number of distinct sections, statutes around the time of the second Code were more verbose and repetitive, while later statutes tended to shorter, more staccato sections in accordingly greater numbers. This could be misleading if the number of provisions enacted in a given period was taken as the sole measure of the importance of Tynwald in making the law.

Despite these reservations, it is submitted that the percentage figures given for criminal law provisions are a useful reflection of the adoptive pattern of Tynwald in this area. The pattern may be summarised as follows, from almost nothing in 1800 the percentage of statutes based on Acts of Parliament reached more than seventy percent by 1859. The level dipped during the mid-nineteenth century, although never falling below fifty percent, before continuing its rise to nearly ninety percent after 1940. After 1980 there was some indication that this level had begun to drop but, at the time of the study, it was too early to categorically indicate a continuing decline in adoption. Adoption was persistently higher in substantive areas of law than in procedure, although the gap was narrowing throughout the period and, as a result of twentieth century legislation, briefly disappeared.

The following section discusses those factors which may explain this pattern, by indicating those features which have encouraged Tynwald to adopt English models. In relation to the pattern shown here, adoption of Acts of Parliament on a given topic tends to encourage adoption of later Acts on the same topic. This is due to an intensification of some of the factors discussed below, and may also reflect a legal tendency to rely upon precedents, even in legislative drafting.

Coercive Adoption.

The first issue to discuss is coercion of the Manx legislature by British organs of government. After discussing the range of mechanisms available due to the nature of the Manx legislative process and position of the Manx legislature ¹, we will discuss the extent to which these mechanisms have been employed.

The coercive mechanism most clearly based on the constitutional position of the Isle of Man is the compulsion of Tynwald by the threat of Parliamentary legislation ². There is only one instance of this mechanism actually being used in the area of criminal law and procedure ³ - the legalisation of consensual male homosexual acts in 1992. Between 1980 and 1990 attempts were made bring the law relating to homosexual offences into line with English law, but these had failed after debate as to the merits of the reform ⁴. During the debates on the reform in 1991, however, it was stated that:

“the United Kingdom Government has indicated to the committee that if Tynwald does not decriminalise homosexual acts between males in private, that it would introduce legislation in Westminster to decriminalise such acts on Man” ⁵.

¹Coercive influence available between sovereign states, such as diplomatic and economic pressure, will not be discussed. Rather, the positional point relates to the dependent status of the Isle of Man.

²This mechanism existed before Revestment, but there is evidence that some commentators at the time of Revestment expected more active a role for this mechanism. See the Petition of the House of Keys to the House of Commons, 1764 [M.M.A.]; Unidentified Newspaper Extract [1765] June 1 [M.M.A.]; SEARLE C., A Short View of the Present State of the Isle of Man, [Douglas] (1767).

³cf. (1869) *Mona's Herald* 15 February 1869. cp. BULLOCK H.A., History of the Isle of Man, [London] (1816); Lieutenant-Governor Loch, 16 April 1882 [H.O. 45.9524.28724].

⁴See (1982) *Isle of Man Examiner* 5 November; (1988) *Manx Independent* 23 April; (1990) *Manx Independent* 20 March; (1990) *Isle of Man Examiner* 12 June; (1990) *Isle of Man Examiner* 19 June; (1991) *Manx Independent* 5 February; (1991) *Manx Independent* 29 March; (1992) *Isle of Man Examiner* 25 February.

⁵Report of the House of Keys Select Committee on the Sexual Offences Bill, (Debates K121) (1991).

In 1992 Tynwald enacted this reform on the basis of British coercion, rather than on their judgement of its merits ¹.

This mechanism functions by the British executive indicating to Tynwald that, if it fails to enact desired legislation, Parliament will enact the legislation required. Clearly, for this threat to carry any force, the legislation has to be of a type that Parliament would consider proper to enact for the Island. Obviously, for this mechanism to be useful to the British executive, there have to be factors which make Tynwald's legislation preferable to legislation by Parliament. These are discussed below². Equally interesting is the question of why Tynwald should prefer to legislate under duress, rather than leave it to Parliament to carry out their threat, and enact their own legislation. The dominant reason appears a constitutional one. In order to preserve, or extend, the practical competence of Tynwald, it was desirable to legislate for the Island wherever possible ³. On a number of occasions this resulted in a situation where Tynwald "very carefully kept in its own hands the right to make its own laws, although they made [them] ... exactly as in England" ⁴. Rather than establish "a precedent that might be used in more damaging areas in the future" ⁵, by increasing those areas where Parliament had legislated for the Island, it was deemed preferable to create a precedent of informal surrender to British coercion ⁶. Less persistent arguments put forward to support this surrender were a desire to retain control over the details of the legislation ⁷, to retain the power of Tynwald to amend the legislation at a later date ⁸, and to ease access to the sources of law ⁹.

¹Sexual Offences Act 1992 s.9-10.

² See p.54.

³Lieutenant-Governor, 19 February 1886 [H.O. 45/9660/A42344].

⁴Mr. Crennel, 3 February 1912 [H.O. 45/10501/120695].

⁵Report of the House of Keys Select Committee on the Sexual Offences Bill, 26 March 1991 [K1273].

⁶cf. Treasury Opinion, 15 November 1913 [H.O. 45/10492/113941].

⁷Report of the House of Keys Select Committee on the Sexual Offences Bill, 26 March 1991 [K1273].

⁸cf. the current view of the status of Parliament at Tynwald, see p.45.

⁹Mr. Kerruish, 3 February 1912 [H.O. 45/10501/120695]; Liddell to Lieutenant-Governor Loch, 12 July 1871 [Letterbooks 19,84].

The other possible mechanisms are more closely linked to the legislative process, and are discussed in the order in which that process was discussed above ¹.

First, control by initiation of legislation. Before the constitutional reforms of the late twentieth century the Lieutenant-Governor was a substantial initiator of legislation ². The Lieutenant-Governor was obliged to follow the wishes of the Lord of the Isle of Man ³, *de facto*, the Home Office. Thus, if particular legislation was desired in the Isle of Man, the Lieutenant-Governor could be directed to initiate it. This mechanism was not negative - it could not prevent a Bill being initiated, as other members of the legislature retained the power to initiate Bills ⁴. With the demise of the Lieutenant-Governor as principal initiator of legislation, in favour of an executive led by Members of Tynwald ⁵, this mechanism has ceased to apply as clearly.

Second, control by drafting. As has been noted, good communications between the British Government and the Insular authorities can lead to a change in the Bill during drafting ⁶. Refusal of Royal Assent also has a coercive influence on drafting. By its nature, influence exercised at this stage deals more with technical matters than matters of principle. The British Government would, however, become aware of a controversial Bill during consultation over drafting.

Third, control by consideration by the financial watchdog. Before this function was internalised, it clearly provided a control over Manx legislation in some areas - a Bill could be prevented from proceeding on the basis of expenditure required.

Fourth, control by consultation with the British government. This is not so much a mechanism of control in itself, but rather a conduit by which the British government could learn of a situation requiring action, and make known to the Manx government its willingness to make use of the other mechanisms discussed here. Communications, however, ran both

¹See p.14.

²See p.15.

³See Deputy-Governor, 8 April 1813 [H.O. 98/68].

⁴See p.15.

⁵See p.139.

⁶See p.15.

ways when the Lieutenant-Governor was active in the government of the Island. There are clear instances of the Lieutenant-Governor seeking Parliamentary legislation in the Island ¹, or advising that the Imperial government should bring pressure to bear upon Tynwald to accept "a principle of legislation on this question similar to that which prevails in England" ².

Fifth, control by discussion in the House of Keys. Before 1866, as is discussed elsewhere, the Lieutenant-Governor retained *de jure* control over the membership of the Keys, although the Keys were *de facto* a self-perpetuating oligarchy ³. As significantly, until 1919 the Lieutenant-Governor had considerable control over the meetings of this Branch ⁴, and could exercise this power for political motives ⁵. The control of the Lieutenant-Governor over the House of Keys should not be overestimated, however, as there are numerous examples of the Keys providing a focus for opposition to the Lieutenant-Governor. The Lieutenant-Governor had far more control over the Legislative Council, and retained this control for longer.

Sixth, control by discussion in the Legislative Council. Until the reforms of the twentieth century ⁶, the Council was composed of officials appointed by and, with the exception of the Bishop of Sodor and Man, holding their offices at the pleasure of, the Lord of Man. It does not appear that these officers were legally required to vote as the Lieutenant-Governor or Lord required ⁷. Commentators are, however, united in placing emphasis upon the appointment of these officers as influencing their voting patterns. The point is neatly made by Vaukins:

¹See Lieutenant-Governor Baron Raglan, 8 November 1912 [H.O. 45/10430/A54660].

²Lieutenant-Governor Walpole, 15 April 1882 [H.O. 45/9524/28724]. The propriety of this call to extra-insular powers by a member of the insular government is open to question - see Lieutenant-Governor Rhodes Bronet, 22 June 1946 [H.O. 45/23228/916383]; Lieutenant-Governor Hope to Lutton, 25 March 1846 [Letterbooks 5,124].

³See p.136.

⁴See Isle of Man Constitution Act 1919 s.3-5.

⁵For instance, in the run up to Revestment the Governor deliberately did not call a meeting of the House of Keys, thus preventing them passing a motion against it as a corporate body.

⁶See p.137.

⁷See GELL J., *op.cit.*, (1881); LOCH G., *Minutes on Opening Sitzings of the Council to the Public*, [M.M.A.] (1881); Letter from R.Jebb to the Governor (1882) 4/1; Lieutenant-Governor Loch to Attorney General Gell, 4 April 1881 [Letterbooks 37,34].

“The powers of the Council were equal to those of the Keys and provided the Imperial Government with a simple but effective device for controlling affairs without having to exert its authority” ¹

Lieutenant-Governors were able to boast of their influence over the Council ², whose deliberations they attended until relatively recently. Writing in 1893 Lieutenant-Governor Walpole stated:

“thus, in the legislature ... power is largely concentrated in the Governor; and, strangely enough, the progress of ideas, instead of limiting, tends to extend his authority. The precise influence which he may exert will necessarily depend on the character and capacity of the individual who happens to hold that office. But it will in any case be large ...” ³.

In his study of legislation during the twentieth century, D.G. Kermode noted that:

“in the sphere of legislation the Governor, as President of the Legislative Council, has been able to make his weight felt during the formative stages of the legislation” ⁴

The control of the Lieutenant-Governor and Lord over the members of the Council declined after 1919, but it was not until 1961 that the members appointed by the Lieutenant-Governor or Lord became a minority in the Legislative Council ⁵. In the same year, the unlimited power of the Council to prevent any Bill becoming law was removed. Accordingly, the extent to which the Council could be used by the British authorities to control legislation declined during the twentieth century.

Seventh, control by the signature of the Lieutenant-Governor to the Bill in Tynwald Court ⁶. The veto power itself was never exercised ⁷, although on one occasion it was used to prevent the enactment of a measure. In 1871 Lieutenant-Governor Loch:

“intimate[d] when the Act [was] under discussion, before the representatives of Man [had] had an opportunity for expressing an opinion upon the measure, that he intend[ed] to veto it, and therefore that no purpose [could] be answered by it's further discussion” ⁸

¹VAUKINS J., The Manx Struggle for Reform, [M.M.A.] (1984) 15; see also BLUNDELL W., A History of the Isle of Man (1656) Manx Soc. 25,1; HORNER S.A., Constitutions of Dependencies and Special Sovereignty: United Kingdom in Association with the British Crown: The Isle of Man, [Boston] (1987); GELL J., op.cit., (1881); Report of the Committee of the House of Keys Appointed to Consider the Whole Question of the Constitution, [Douglas] (1943)

²LOCH G.,op.cit., (1881).

³WALPOLE S., The Land of Home Rule, [London] (1893) Ch.17; See (1886) Manx Sun 25 September.

⁴KERMODE D.G., op.cit., (1968).

⁵See p.138.

⁶See p.17.

⁷See D.G. KERMODE, op.cit., (1968); WALPOLE S., op.cit.,(1893) Ch.17.

⁸See (1871) Mona's Herald 6 August.

This power was not exercised after the debates of Tynwald began to be properly reported, and there is no evidence that it was exercised over legislation in this area.

Finally, control by granting of the Royal Assent ¹. The power to refuse Assent remains one of the "emergency powers of [Her] Majesty's Government" ², and it is important to determine the criteria upon which an Act will be refused Assent or, more commonly, upon which it will be indicated that a proposed Bill would not receive Assent. The principal criteria used by the Home Office appear to be unacceptable drafting, nullity of the measure, unacceptable departure from English law, violation of international obligations and a number of criteria put forward in theory, but not supported by concrete examples in this area. It is worth noting that many of the examples discussed below date from a period when refusal of Royal Assent may have been less controversial than today, and when all Acts passed *de jure* to the Crown itself for Assent. Thus, some of the examples given may not in the future result in refusal of Assent. In order to clearly signal this the past tense is used in the discussion that follows.

If a Bill was poorly drafted ³, or unclear ⁴, or unduly complicated ⁵ it was unlikely to receive Assent. Poor drafting might be accepted if based upon an English statute ⁶, although the Home Office did not insist upon adoption of English drafting ⁷, or an earlier Manx statute ⁸.

¹Disallowance was so rare that it is not discussed in this section, although logically it would follow Assent.

²Treasury, 15 November 1913 [H.O. 45/9319/16550].

³Jury Bill 1830 (Home Office 29 August 1830 [H.O. 99/18]); Petty Sessions Bill 1864 (Lieutenant Governor Loch 6 July 1864, Law Officers 21 June 1864, Lieutenant-Governor Loch 16 June 1864 [H.O. 45/ O.S. 7550]).

⁴Criminal Code Amendment Bill 1830 (Home Office 29 August 1830 [H.O. 99/18]); Capital Punishment Bill 1849 (Home Office 5 May 1949 [H.O. 99/19]).

⁵Criminal Code Bill 1817 (Lieutenant-Governor Smelt, 24 April 1817, Lieutenant-Governor Smelt, 23 June 1817, Lieutenant-Governor Smelt, 11 July 1817 [H.O. 98/68]).

⁶Home Office 29 July 1938 [H.O. 45/18263/811609]. See also Waddington to Lieutenant-Governor Walpole, 10 June 1864 [Letterbooks 10,289]; Lieutenant-Governor Walpole to Secretary of State, 16 June 1864 [Letterbooks 10,295]; Waddington to Lieutenant-Governor Walpole, 19 August 1864 [Letterbooks 10,406].

⁷Compare Howard to Lieutenant-Governor Loch, 9 November 1876 [Letterbooks 31,227] with Lieutenant-Governor Loch to Howard, 28 October 1876 [Letterbooks 31,162]; Lieutenant-Governor Loch to Howard, 15 November 1876 [Letterbooks 31,227]. See also Lieutenant-Governor Loch to Under-Secretary of State, 26 December 1871 [Letterbooks 19,663]; Lieutenant-Governor Loch to Howard, 28 October 1876 [Letterbooks 31,162]; Lieutenant-Governor Loch to Howard, 15 November 1876 [Letterbooks 31,162]; Lieutenant-Governor Loch to Under-Secretary of State, 27 January 1880 [Letterbooks 35,694].

⁸Lieutenant-Governor Walpole to Under-Secretary of State, 12 August 1876 [Letterbooks 30,547]; Lieutenant-Governor Loch to Under-Secretary of State, 27 January 1880 [Letterbooks 35,694].

Another ground for refusing Assent was where the Bill could not become law in any case. The most obvious example, during the currency of the subordinancy of Tynwald to Parliament, was where the Bill contradicted some Act of Parliament in force in the Isle of Man, such as the postal provisions of the draft Code of 1872 ¹. A further ground for refusal was if the Bill was considered *ultra vires* in some other way ², for instance by being contrary to the fundamental principles of English law ³. With the change of perception of the powers of Tynwald this ground became increasingly redundant. Even during its currency, it shaded into the next ground to be discussed. A good example can be found in 1865, when a Bill to provide for the speedy capture of sheep stealers was refused Assent “in consequence of their Lordships having been advised that its leading principle was contrary to the tenets of British jurisprudence” ⁴.

Bills were refused Assent on the basis that they differed from English law. In 1796 a Bill was refused Assent primarily because it “[extended] to make acts criminal by the law of Man which [were] not criminal by the law of England” ⁵. In 1830, a clause in a Bill was criticised because it would make it very difficult for the Manx courts to follow an English practice ⁶. In 1849 a Bill to limit capital punishment was rejected since “it [was] an important departure from the law of England” ⁷, although this attitude was less marked where a statute simply failed to implement English law, as opposed to actively contradicting it ⁸. By 1872, this

¹Lieutenant-Governor Loch 24 January 1871, Home Office 14 June 1871, Law Officers 3 July 1871, Lieutenant-Governor Loch 9 August 1871, Lieutenant-Governor Loch 15 February 1872, Lieutenant-Governor Loch 12 March 1872 [H.O. 45/9393/16550]. See also Law Officers 5 October 1948 [H.O. 45/22981/567948].

²See Law Officers, 5 October 1948 [H.O. 45/22981/567948].

³See p.45.

⁴See Home Office 16 June 1855 [H.O. 99/19]; See also Lieutenant-Governor Hope to Mulsey, 21 February 1837 [Letterbooks 8,25]; H. Waddington to Lieutenant-Governor Hope, 9 May 1857 [Letterbooks 8,87].

⁵Home Office 14 January 1797, Lieutenant-Governor Shaw 16 January 1797, Lieutenant-Governor Shaw 24 February 1797 [H.O. 98/65].

⁶Jury Bill 1830 (Home Office 29 August 1830 [H.O. 99/18]).

⁷See Home Office 4 April 1849, Home Office 5 May 1849 [H.O. 99/19]. See further, Lieutenant-Governor Hope to le Mallham, 10 March 1848 [Letterbooks 5,461]; Waddington to Lieutenant-Governor Hope, 26 March 1850 [Letterbooks 6,94]; Lieutenant-Governor Hope to Lewis, 30 March 1850 [Letterbooks 6,97]; Lewis to Lieutenant-Governor Hope, 22 April 1850 [Letterbooks 6,107]; Waddington to Lieutenant-Governor Hope, 1 August 1851 [Letterbooks 6,217]; Waddington to Lieutenant-Governor Hope, 17 January 1852 [Letterbooks 6,328].

⁸Civil Registration Bill 1849 (See Home Office 16 February 1849 [H.O. 99/19].

criteria had been undermined. During the discussion of the second Code ¹ Lieutenant-Governor Loch vigorously defended the Manx right to differ:

“I quite concur in the opinion that it might be desirable that the sentences for similar offences should be the same in the Isle of Man as in England, but the Manx legislature is competent to award what punishment it thinks fit to insular felons” ².

After that time, this criteria was not invoked by the Home Office in relation to public law, but it is clear that it remained a factor to be considered in granting Assent ³. Consideration of this issue was more delicate, as demonstrated by the submission of the Home Office to the Kilbrandon Commission:

“The fact that the United Kingdom and the Islands are all parts of the British Isles, while certainly not making uniformity essential, make it nevertheless highly desirable that the practices and institutions of the Islands should not differ beyond recognition from those of the United Kingdom” ⁴.

Regarding violation of international obligations, it is worth re-iterating that:

“the British Isles are an entity in the eyes of the world and Her Majesty’s Government would be held responsible internationally if the Island were to overstep the limits of acceptability” ⁵.

By analogy with the exercise of the legislative authority of Parliament in the Broadcasting Dispute, and the perceived threat of such legislation in regard to male homosexuality ⁶, it would appear likely that the Home Office would not recommend Assent to an Act which would place the United Kingdom Crown in violation of its international obligations

The remaining criteria for refusing Assent are not supported by concrete examples, but have the support of Home Office officials. It has been suggested that Assent would be refused if the Act was repugnant to morals ⁷, adversely affected the interests of the United Kingdom government or Her Majesty’s subjects in the United Kingdom ⁸, affected the Royal

¹See p.165.

²See Lieutenant-Governor Loch 12 March 1872 [H.O. 45/9319/16550].

³See Home Office, 13 September 1948 [H.O. 45/22981/567948] which makes it clear that "account would have to be taken of local conditions and it must not be supposed that ideas of justice are the same in the Islands as in Great Britain".

⁴Kilbrandon Report, (1973) Minutes of Evidence 6,7 per the Home Office and the Foreign and Commonwealth Office.

⁵ibid.

⁶See p.23.

⁷Meeting with the Law Officers, 2 May 1949 [H.O. 45/22981/567948].

⁸Home Office Minutes, 13 September 1948 [H.O. 45/22981/567948].

Prerogative or the constitutional position of the Isle of Man ¹, infringed basic principles to which all good legislation was to conform, or would have seriously deleterious affects on the government of the Isle of Man ².

It would be erroneous to view the above criteria as exclusive, or forming some sort of limit on the discretion of the Home Office. It is clear that the Home Secretary has "an unrestricted right to refuse to recommend a Bill if it would not be in the public interest for it to become law" ³. It has been recognised in the Isle of Man that a Bill could be refused Assent for reasons other than those detailed above ⁴

The most commonly used mechanisms, even before the decline of the more subtle methods of coercion, were the threat of Parliamentary legislation and refusal of the Assent. This array of mechanisms was remarkably unused in relation to criminal law and procedure, perhaps because the vast majority of Acts of Tynwald in this area were of little interest to the English authorities. They were viewed as matters of internal regulation which, apart from a degree of control over details of drafting, were suitable matters for the exercise of insular discretion.

Voluntary Adoption.

Far more important than coercion is the voluntary adoption of English models. That is to say, the adoption of an English statute in an area where the British government has no particular interest in either the form or content of the legislation. Because of the interaction of the different forces discussed below, and their existence as a subtext rather than text in discussion of the Bills, it is not possible to categorically state the relative importance of these factors. A rough indication of importance follows this general discussion.

¹ibid.

²See Lieutenant-Governor Loch 12 March 1872 [H.O. 45/9319/16550]; Home Office Minutes 13 September 1948 [H.O. 45/22981/567948]; Liddlell to Lieutenant-Governor Loch, 21 January 1880 [Letterbooks 35,680]; Lieutenant-Governor Loch to Under-Secretary of State, 27 January 1880 [Letterbooks 35,694]; Lushington to Lieutenant-Governor Loch, 11 June 1880 [Letterbooks 36,163]; Lieutenant-Governor Loch to Under-Secretary of State, 6 July 1880 [Letterbooks 36,200].

³Home Office Minutes, 13 September 1948 [Home Office 45/22981/567948].

⁴See Summary Jurisdiction Bill 1960 (Keys 1 March 1960 [Debates 77,452]. See also KERMODE D.G., "The Process of Royal Assent to Acts of Tynwald: A Study of Refusals Since 1900", (1979) I.O.M.N.H.A.S. (P.) 8,130.

The first point to make is that adopting an English Act as a result of a direct threat of British intervention cannot be regarded as voluntary ¹. As we have discussed, however, a Manx Bill could be refused Assent due to poor drafting, even though otherwise of no interest to the British government ². One way to avoid this danger was to adopt an English Act. A good example of this mechanism can be found in the second Code, where the Law Officers persistently favoured a closer adoption of English models wherever they were unhappy with the sections drafted ³. Thus, a single draftsman might seek to achieve accepted levels of draughtsmanship by adherence to an English statute. As Engle noted, “[b]ills are made to pass as razors are made to sell” ⁴. With the rise of an extended insular drafting team, and the importation of assent to non-contentious Bills, this factor has declined in importance.

Other technical matters may encourage the draftsman to adopt an English Act before the Bill enters the legislature ⁵. Given the broad similarity between Manx and English law in many areas, often as a result of earlier adoption of English models, and similar juristic philosophies and traditions, it seems entirely reasonable for a draftsman to make use of the work of an English draftsman and take an existing English Act as his model ⁶. On at least one occasion the draftsman favoured postponing the entry of a Bill into Tynwald until he had had “the opportunity of seeing [the Bill about to be introduced] in England” ⁷, and this merely illustrates the importance indicated by the adoption figures. Clearly, this reliance upon the English models can only be increased when the draftsman is trained in the English legal

¹Accordingly, it has been discussed in relation to coercive mechanisms of the British Crown. For justification of this division, see NORRIE A., Crime, Reason and History, [London] (1993) 154-171.

²See p.28.

³See p.165.

⁴ENGLE G., “Bills are made to pass as razors are made to sell: Practical constraints in the preparation of legislation” (1983) Statute Law Review 7.

⁵See LEFESTREY E.J.T., “Legislative drafting in a Mini-State”, (1983) Meeting of Law Officers of Small Commonwealth Jurisdictions 155. The relevance of this article was acknowledged by the Manx Attorney General - CAIN T.W., “The Legislative Draftsman in a Small Jurisdiction”, (1990) 11 Statute Law Review 77; reprinted in (1993) 19 C.L.B. 1237.

⁶See, for instance, Lieutenant-Governor Loch to Secretary of State, 24 January 1865 [Letterbooks 10,538]; Baring to Lieutenant-Governor Loch, 26 January 1865 [Letterbooks 10,539].

⁷Lieutenant-Governor Hope to Lewis, 30 March 1880 [Letterbooks 6,97]; Lewis to Lieutenant-Governor Hope, 22 April 1850 [Letterbooks 6,107].

system. The Code of 1817, for instance, which adopted English common law models, was “revised and improved with great industry and ability by ... an English barrister of ... much talent” ¹.

This technical preference for English Acts was, before 1960, accepted by Tynwald. Legislative records before 1891 are too brief to enlighten ², but between 1891 and 1960 a cohesive line can be found in debates and other official documents. A draft Bill presented to the legislature could be justified, if subject to criticism, as being based on an English draft ³. The ultimate expression of this institutional preference for English models came during a debate on the *Bankers Book Evidence Bill 1935*, when Norris, a Member of the House of Keys, argued that:

“we should know, and the public should know, where we are varying, if we do vary, from the English law, and the reason for which the variation is made” ⁴.

After 1960, this theme ceased to appear in debates. Rather, it appears that Tynwald began to accept Bills on their drafting merits ⁵.

On the substance of a Bill, one early theme was an uncritical acceptance of the superiority of English law and legislators, over Manx law and legislators. One of the best, and earliest, examples of this was the preamble to a statute of 1777:

“Whereas many of the laws and customs of this Isle have been found not only to be defective, but in many instances impolitick and very inadequate to the Purposes of good order and government; it now being thought expedient to repeal all obsolete and useless laws, which however properly adopted to more early ages are now become insufferable and oppressive, and to institute a new arrangement and connection of the most wholesome laws, retaining every part possible of the ancient constitution, and being made to bear the

¹See p.161.

²See p.102.

³See Lieutenant-Governor Walpole to the Undersecretary of State, 2 December 1891 [Letterbooks 1891-3, 139]; Criminal Code Amendment Bill 1892 (9 July 1891 (Council: Debates 9,45); 19 November 1891 (Council: Debates 9,224); 15 March 1892 (Council: Debates 9,616)); Admission to Bail Bill 1908 (23 December 1907 (Council: Debates 25,233)); Juries in Trials in Felonies Bill 1924 (12 February 1924 (Keys: Debates 39,464)); Summary Jurisdiction Bill 1956 (14 October 1955 (Council: Debates 73,5)); Jury Bill 1960 (6 October 1959 (Council: Debates 77,3)).

⁴*Bankers Book Evidence Bill 1935* (22 January 1935 (Keys: Debates 52,51)).

⁵For an early dissent against this theme, which actually emerged expressly, see Criminal Law Amendment Bill 1886 (23 November 1885 (Council: Mona's Herald 23 November 1885)).

nearest Resemblance to the system of English jurisprudence, which is conceived may greatly conduce to the Honour, Welfare, and Happiness of this Isle”¹.

Writing in 1927 Moore saw this statute as:

“the beginning of the anglicisation of Manx law which has characterised modern days, and which is steadily reducing the fine originality and independence of Manx common law to a servile adaptation of the laws of England”².

Many later examples of this uncritical deference can be found³. Such sentiments ceased to be expressed after 1967, but a much more commonly expressed sentiment, based on the same assumptions, continued until later still. There was a strong theme that, as English law represented the best possible solution to any problem, a failure by the Manx legislature to adopt an English Act would cause Manx law to fall behind English law, and thus become out-of-date⁴. This theme may have begun to lose its prominence⁵.

The practical benefits of linking Manx and English law are clear. Lacking the financial resources of the United Kingdom, Manx legislators often have recourse to United Kingdom

¹Act of Settlement 1777, preamble.

²MOORE R.B., "The Romance of Manx Common Law", (1927) Ramsey Courier 11 November.

³See, for instance, Criminal Evidence Bill 1946 (9 July 1946 (Keys: Debates 63,791); cp. Summary Jurisdiction Bill 1960 (1 March 1960 (Keys: Debates 77,452)); Petty Sessions and Summary Jurisdiction Bill 1927 (15 March 1927 (Council: Debates 44,520)); Forgery Bill 1952 (11 December 1952 (Keys: Debates 69,67)); Firearms Bill 1947 (14 January 1947 (Keys: Debates 64,185)); Drugs (Prevention of Misuse) Bill 1965 (2 February 1965 (Keys: Debates 82,635)); Criminal Evidence Bill 1967 (11 April 1967 (Keys: Debates 84,1055)).

⁴A vast number of examples can be found. The best are Petty Sessions and Summary Jurisdiction Bill 1900 (23 February 1900 (Council: Debates 17,181)); Criminal Evidence Bill 1946 (9 July 1946 (Keys: Debates 63,791)); Dangerous Drugs Bill 1947 (5 November 1946 (Keys: Debates 64,185)); Restriction of Offensive Weapons Bill 1963 (12 February 1963 (Keys: Debates 80)); Criminal Justice Bill 1963 (12 February 1963 (Keys: Debates 80,549)); Sexual Offences (Modification) Bill 1979 (6 March 1979 (Council: Debates 96,114)); Coinage Offences Bill 1980 (13 November 1979 (Keys: K145)); Criminal Law Bill 1981 (30 May 1978 (Keys: Debates 95,K825)). In the absence of further details references to the value of "assimilation ... as far as circumstances will permit" seem to come into the same category - see Lieutenant-Governor Hope to Lewis, 30 March 1850 [Letterbooks 6,97].

⁵See Sexual Offences Bill 1990 (1 April 1990 (Keys: Debates K1233)); Criminal Code Amendment Bill 1914 (6 February 1914 (Council: Debates 13)); High Baliffs Amendment Bill 1933 (22 November 1932 (Keys: Debates 50,168)); Summary Jurisdiction Bill 1960 (2 February 1960 (Keys: Debates 77,353)); Coinage Offences Bill 1980 (13 November 1979 (Keys: Debates K145)); Evidence Bill 1983 (5 October 1982 (Council: Debates 100,C8)).

research, and thence proposals, when formulating their statutes ¹. A particularly fine example of this is the *Theft Act 1981*, discussed elsewhere ². Also, if the Act to be adopted has been in force in England for some time, the effect the legislation has in practice could be considered before adoption ³. Additionally, once an Act has been adopted, the Manx courts can have recourse to English cases on the meaning of the English Act ⁴, as well as English academic writings ⁵. In a survey of materials used by Manx Advocates in 1993 the second most frequently considered source was English textbooks ⁶.

It also appears that Tynwald has regard to the position of the Isle of Man as one of a group of islands. Thus, arguments have appeared based on the need to prevent the Isle of Man being used as a base for criminal activity in England ⁷; or on the reasonable expectations of English

¹See Jury Act 1960 (6 October 1959 (Council: Debates 77,3)); Criminal Law Bill 1981 (25 June 1980 (Keys: Debates 97,K457)); Theft Bill 1981 (1 November 1977 (Council: Debates 95,C23)).

²See p.222.

³See Summary Jurisdiction Bill 1960 (12 January 1959 (Council: Debates 77,249)); Criminal Law Bill 1981 (24 June 1980 (Keys: Debates 97,K487)); Criminal Damage Bill 1981 (5 April 1977 (Keys: 94, K131)); Evidence Bill 1983 (4 May 1982 (Key: Debates K488)); Summary Jurisdiction Bill 1986 (10 December 1985 (Keys: Debates 103,K446)); cf. Firearms Bill 1947 (14 January 1947 (Keys: Debates 64,185)); Administration of Justice Bill 1949 (5 April 1949 (Keys: Debates 66,557)).

⁴See Forgery Bill 1952 (11 December 1951 (Keys: Debates 49,67)); Larceny Bill 1946 (19 March 1946 (Keys: Debates 43,448)); Criminal Evidence Bill 1946 (19 March 1946 (Keys: Debates 43,448)); Criminal Evidence Bill 1946 (9 July 1946 (Keys: Debates 63,792)); Fraudulent Mediums Act 1952 (11 December 1951 (Keys: Debates 69,61)); Sexual Offences Bill 1967 (4 April 1967 (Council: Debates 84,1021)); Coinage Offences Bill 1980 (5 February 1980 (Council: Debates 97, C103)); Evidence Bill 1983 (10 December 1985 (Keys: Debates 103, K446)).

⁵See Criminal Evidence Bill 1946 (9 July 1946 (Keys: Debates 63,792)); In relation to Scotland "the exceedingly narrow market for legal textbooks" has been seen as one reason for the assimilation of statute law - Kilbrandon Report, (1973) Minutes of Evidence 5d at 14 per Law Society of Scotland.

⁶ See Edge P.W., The British Influence Over the Making of Manx Criminal Law and Procedure, 1765-1993, (Ph.D. Thesis, University of Cambridge).

⁷See Pharmacy and Dangerous Drugs Bill 1923 (18 November 1921 (Council: Debates 49,142)); Pharmacy and Dangerous Drugs Bill 1924 (30 October 1923 (Council: 49,59)); Drug Trafficking Offences Act 1987 (Council: Debates 104,C25)).

visitors to the Isle of Man ¹. While limited in scope, these themes appeared to be current today.

The above category blurs into the more rigidly constitutional theme of structural links between the Isle of Man and England. In some areas, such as prison sentences, voluntary arrangements between the Isle of Man and England have made identical legislation especially desirable ². In other areas, international law is so closely entwined with domestic law as to make conformity to English statutes desirable ³. The most interesting aspect of this category, however, is where the constitutional relationship between the Isle of Man and England encourages adoption, *de jure*, of English law already operating *de facto*.

The clearest instance of this is the abolition of capital punishment ⁴. After the abolition of the death sentence for murder in England, it remained the mandatory penalty for murder in the Isle of Man. It was perceived that, with the decision to commute vested in the Home Secretary, the sentence would no longer be carried out. The conflict was brought out most clearly in 1992, in the wake of a murder conviction, in an editorial in the Isle of Man Examiner:

“Retaining the death penalty served absolutely no useful purpose. All it meant was that if a defendant was found guilty of murder, the court had no option but to impose a sentence of death in the full knowledge that the sentence would never be carried out. It involved the Courts of the Isle of Man in a silly, useless and time-wasting charade. In recent times, retention of the death penalty has provided easy fodder for the worlds media to poke a little more fun at the anachronistic Isle of Man” ⁵.

¹Petty Sessions and Summary Bill 1927 (15 March 1927 (Council: Debates 44,520)); Petty Sessions and Summary Jurisdiction Bill 1900 (6 March 1900 (Keys: Debates 17,221)); Summary Jurisdiction Bill 1960 (2 February 1960 (Keys: Debates 77,353)). See especially the statement of the Deemster in 1886 that "I think it would be a monstrous thing if persons were committed for an offence which was a felony here and not a felony in England" - Criminal Law Amendment Bill 1886 (10 April 1886 (Council: Manx Sun 10 April 1886)).

²Criminal Justice Bill 1963 (7 May 1963 (Keys: Debates 86,1182)); Criminal Justice (Computation) Act 1975 (10 June 1975 (Council: Debates 92,C313)). See also Bruce to Lieutenant-Governor Loch, 19 November 1969 [Letterbooks 16,77]; Beach to Lieutenant-Governor Loch, 26 October 1868 [Manx Museum - G.O. 5/41]; Hobhouse to Lieutenant-Governor Shaw, 16 May 1816 [H.O. 48/17].

³Genocide Bill 1969 (13 May 1969 (Council: Debates 86,1660)).

⁴A similar structural link has influenced the law relating to forfeiture which does not, however, appear to have been formally abolished - see p.252.

⁵COLUMNIST, "Birching for the legal scrapheap", (1992) Isle of Man Examiner 30 June.

The death sentence for murder was abolished, by Act of Tynwald, in 1992 ¹.

Conclusion.

In the past, a variety of mechanisms allowed the British government to apply discreet pressure on Tynwald to adopt desirable legislation. While the range of mechanisms has decreased, even today the ultimate power of Parliament legislation, coupled with ultimate control of Assent over Acts of Tynwald, keep the possibilities of coercion open. The decline of the subtler mechanisms of coercion may make it appear that the British government has begun to exercise a heavier hand, but this is hardly the case. It remains to be seen whether the surrender of Tynwald in the recent conflict over male homosexuality indicates a long-term acceptance of the validity of the mechanisms of control remaining.

The increasing importance of overt mechanisms of control should not blind us to the actual pattern of control. Before Revestment the British government did not generally concern itself with Manx affairs, control of which was a proprietary right of an influential subject. In an era of limited communications it was practical to treat the Isle of Man as an isolated unit of little or no concern to the British government. By 1765 this approach had become impossible. It should not be forgotten that the principal reason for Revestment was to protect United Kingdom revenues threatened by Manx smuggling. Revestment placed control of Manx affairs into the hands of the Imperial government which, when it required particular legislation, grew to favour bringing pressure to bear on the Manx legislature rather than placing a Bill before Parliament. While the means to coerce existed the will did not. It is clear from official correspondence, that purely domestic matters such as criminal law and procedure were of little interest to the British authorities. During the nineteenth century the principal causes of conflict between the Manx legislators and the British government were caused by poor, occasionally abysmal, drafting and potential interference with Imperial structures.

During the twentieth century the quality of drafting of Manx statutes improved, and less pressure was applied to adopt English Acts for technical reasons. The growth of international obligations, particularly those under the European Convention on Human Rights, and their extension to traditionally insular areas of competence led to an increased incidence of

¹See p.258.

coercion being applied to legislation such as the Sexual Offences Act. The extent to which the British government was willing to coerce Tynwald outside of these areas was small.

It would be wrong, therefore, to view adoption of English models *per se* as evidence of the British domination of Tynwald. The remarkable pattern of adoption is explicable as voluntary action by the Insular legislature.

To some extent, this adoption was not only inevitable, but highly desirable. Practical pressures on the Manx draftsmen and legislators caused a pre-fabricated uncontentious model to be adopted time and time again. Once an area had become governed by English models, those pressures became more intense. The use of English models as an expedient was, and remains today, entirely justifiable.

Less valuable, and less obvious in debates and drafting practice towards the end of the period, was an uncritical acceptance that English models were best for the Isle of Man. The use of English statutes became more cautious after 1980, and it may well be the case that the coming years will see a decline, albeit a small one, in the proportion of Manx statutes based on English models.

This discussion is based primarily upon analysis of Acts of Tynwald dealing with criminal law and procedure. It seems likely that the balance between coercive and voluntary adoption of English models in a particular area depends upon the extent to which the Home Office sees extra-insular interests at stake. Nonetheless, it seems probable that the general balance remains overwhelmingly in favour of voluntary adoption rather than coercion.

Finding Acts of Tynwald.

Turning to a more practical point, finding Acts of Tynwald has not always been straightforward. Before 1792 the text of Acts of Tynwald could be copied from *Liber Scaccarii* by the Clerk of the Rolls. After 1792 a number of private compilations of statutes were circulated ¹. The statutes became more conveniently available in the bound collection first published in 1883 and continued to the present ². These *Statutes of the Isle of Man* also

¹See BLUETT J.C., The Advocate's Notebook, [Douglas] 1847, Introduction.

²See on the background to this collection - Lieutenant-Governor Loch to Under-Secretary of State, 8 July 1875 [Letterbooks 28,69]; Liddell to Lieutenant-Governor Loch, 3 August 1875 [Letterbooks 28,153]; Lieutenant-Governor Loch to Secretary of State, 9 August 1875 [Letterbooks 28,183]; Liddell to Lieutenant-Governor Loch, 2 September 1875 [Letterbooks 28,302]; Gill to Lieutenant-Governor Loch, 17 December 1879

contain declarations of customary law, and ordinances of doubtful legal effect, which the compiler wisely chose to reproduce in small print rather than exclude from the compilation. The Manx General Reference Library ¹ has the full series, as well as more recent statutes awaiting binding into volumes.

The volumes at the General Reference Library are especially useful as manual amendments are made to them when amending statutes are enacted ². In the absence of a conventional statute citator, this can be very useful. Obsolete indexes are available as part of the series and a pamphlet, listing current statutes under broad headings, is printed by the Manx government.

At the time of writing, the transfer of the series to CD-ROM is confidently expected, albeit delayed. This should have a number of important advantages, as most modern CD-ROM search engines should be expected to fulfil the role of a citator.

Acts of Parliament.

Parliament can also legislate for the Isle of Man, although the legal extent of its authority, and the constitutional propriety of exercise of that authority, has often been unclear. This section discusses both these issues, and considers the *de facto* impact of Parliamentary authority.

The Powers of Parliament.

Although the authority of the United Kingdom Parliament to legislate for the Island seems beyond question, the exact scope of that authority is occasionally unclear. The potential limitations upon that authority discussed here are: that Parliament was able to legislate for the Isle of Man only after Revestment, that Parliament is able to legislate only on certain subjects, that Parliament is restricted by the manner and form of legislation it wishes to apply to the Isle of Man, and, finally, that Parliament is not the sole supreme legislature in the Isle of Man.

It cannot be denied that Parliament has legislated for the Isle of Man, and that such legislation has been accepted by the Manx courts. After Revestment, Manx courts of first instance ³ and

[Letterbooks 35,601]; Lieutenant-Governor Henniker-Major to Deemster Drinkwater, 23 March 1897 [Letterbooks 1896-8,218].

¹Contact: The Archivist, Manx General Reference Library, Government Offices, Douglas, Isle of Man.

²It is common practice for private firms of advocates to copy these amendments into their own volumes as and when staff resources allow.

³For instance, Burrows (1831) Manx Sun 2 August, Manx Sun 3 November.

the Staff of Government in its appellate jurisdiction ¹ applied Acts of Parliament to the Isle of Man. The findings of the Kilbrandon Commission, accepted as authoritative by a Manx Chief Minister in 1991 ², unequivocally acknowledged this power ³. It could be argued, however, that Parliamentary authority did not exist until after Revestment in 1765. This is a point worth discussing as not only would it cast doubt on the validity of some statutes, but it would also provide valuable guidance as to the nature of Parliamentary authority in the Island.

There are numerous examples of Parliament seemingly legislating for the Isle of Man before Revestment. Many of these extended to the Isle of Man not by express words but by implication ⁴ - an implication that would not exist if Parliament could not legislate for the Isle of Man. This logical reservation does not explain those Acts of Parliament which referred to the Isle of Man by express words. A good example of this is *33 Hen.8 c.6*, which restricted the keeping of crossbows and handguns with qualifications for, *inter alia*, the inhabitants of the Isle of Man ⁵. Many parts of the statute could not, when the act was passed, have been put into effect in the Isle of Man ⁶, but section eighteen of the statute states:

“Provided alwayes and be it enacted by thauctoritie aforesaid that this [present] Acte ne any thinge therin conteyned shall in anywise extend or be [prejudicial] unto the ... King’s subjects inhabitaunts of the Towne and Marches of Callice, nor to any of the inhabitaunts of the Isles of Jersey, Gernesey, Anglesey and the Isles of Weight and Man, but that it shall be lawful for exercise of the saide inhabitants at all tymes hereafter to have excise and use their handguns, hagbutts and demyhakes of the lenghes abovesaide within the lymytte and Isles abovesaid *so that it be at noe manner of Dere heron shoveler feasant patriche wild swanne or wilde elke or any of them*; this [present] Acte or any thinge therein conteyned to the contraie notwithstandinge.”

As the added emphasis shows, this section did not simply note that no liability would attach to inhabitants of the Isle of Man under the section, but rather provided a limited defence. Beyond those grounds, the section clearly purported to create legal duties upon the inhabitants of the Isle of Man.

A fallback position is that, while Parliament purported to pass legislation affecting the Isle of Man, before 1765 the statutes were so inconsequential that their validity was not disputed ⁷. This would require all Acts of Parliament before 1765 to be “explained away by such

¹For instance, *In re Tucker* (1988) 11 Manx L.B. 33.

²See (1991) 17 Manx L.B. 5.

³*Kilbrandon Report*, (1973) para. 1362, 1469.

⁴Including the earliest - 25 Edw.3 st.1.

⁵Repealed by 1991 c.61.

⁶See especially s.13 which requires a procedure for arrest of offenders involving "the next justice of the peace of the same countye where the said offender or offenders shalbe founde soe offending".

⁷CUBBON W., *Island Heritage*, [Douglas] (1952) 234,243.

considerations as that the Imperial Acts were laxly applied, and that colonial attention was not seriously directed towards the issue”, as Berriedale has observed of the apologists of the American Revolution ¹.

In a monarchy such as the Isle of Man, which gave the Lord enormous *de facto* as well as *de jure* powers, the identity of the Lord was crucial. If Parliament determined the identity of the Lord of the Isle of Man, and this was accepted in the Isle of Man, it could not be regarded as mere acquiescence in a matter of no import. In 1594 Lord Ferdinando of the Isle of Man died, leaving three daughters. A dispute arose between the daughters, as heirs general, and William Earl of Derby, as heir male ². In 1609 the dispute came before the Lords of the Council, who found in favour of the heirs general. They subsequently agreed to the extinction of their rights. The Crown granted the Isle of Man to Earl William and his wife conjointly, and thence to their descendants ³. An Act of Parliament to similar effect was passed in 1610 ⁴, but the grant of the Isle of Man to William by the Crown, and the Act of Parliament, differed. In particular, the Act provided in more detail for succession, and restricted the power of the Lord to alienate. In a later case, the Lord Chancellor applied the Act, rather than the grant, in determining the nature of the title to the Isle of Man ⁵.

It could be argued that legislation relating to the identity of the Lord was a special case. As was noted in the above cases, the courts of the Isle of Man were the Lord’s Courts, and did not have power to determine the identity of the Lord, just as the law which governed the identity of the Lord was the common law, rather than the law of the Isle of Man. There is, however, an opinion of the Privy Council indicating that Acts of Parliament on another subject extended to the Isle of Man before Revestment.

William Christian ⁶ was an important figure in Manx politics during the English Civil War. At a crucial point he led an armed force opposed to Lady Derby, who was holding the Isle of Man for her Royalist husband. Upon the Restoration in the Island, he was absent but,

¹BERRIEDALE K.A., Constitutional History of the First British Empire, [Oxford] (1930) p. 117.

²The English Crown took possession of Mann during the dispute, which was resolved in 1609, although the Lord did not take possession until 1612.

³Manx Society 9,99.

⁴8 Ja.1 c.4 - Manx Society 9,114.

⁵*Bishop of Sodor and Man v Earl of Derby, Earl of Derby v Duke of Atholl* (1751) 2 Ves.Sen. 337.

⁶Christian is a very common Manx name, and he is often referred to by his nick-name of *Illiam Dhone* (Mx. "Brown William") in the literature.

believing that Parliament's Act of Indemnity ¹ protected him, returned. He was tried for treason by the insular courts, convicted, and sentenced to death.

Christian petitioned the King in Council, pleading that the proceedings violated the Act of Indemnity. His petition did not reach London until after his execution, but his heirs lodged a petition for redress, and the Privy Council eventually considered the case on that basis ². The Act of Indemnity did not refer to the Isle of Man by name, but rather to England, Ireland, Scotland and the dominions and territories thereto belonging. The Privy Council considered that "the Act of General Pardon and Indemnity did and ought to be understood to extend to the Isle of Man". While their interpretation of the Act, and of the charge against Christian, is open to criticism ³ the core of their decision is clear. The Privy Council on appeal from the Isle of Man ⁴ on a matter unconnected with the identity of the Lord of the Isle of Man, but having a substantial effect on the conduct of Manx affairs, held as the *ratio decidendi* of the case that an Act of Parliament extended to the Isle of Man ⁵.

It would appear, therefore, that the power of Parliament to legislate for the Isle of Man was established before 1765. Doubts expressed at Revestment may have reflected an Empire-wide state of flux, rather than Manx legal doctrine ⁶.

Moving on to more contemporary issues, given that Parliament can legislate for the Isle of Man, it would appear reasonable to assume, in the absence of evidence to the contrary, that

¹12 Cha.2 c.11.

²See on this Manx Society 26,2. The original file, at The Court of Whitehall, 27 March 1663 is at the P.R.O. [P.C.. 1/15/4].

³Briefly, the two serious flaws in the judgement are as follows. The Isle of Man was not a dominion of either England or Scotland, although it was a possession of the Crown, and so the Act did not extend to it. Even if it did, it was to be construed as referring to treasons against the English Crown, whereas *Illiam Dhone* was punished for treason against the Manx Crown. Neither of these flaws affect this point.

⁴On this possible importance of this, see p.75.

⁵Against this case, which was from the highest Manx court, can be placed Governor-Bishop Meryks Judgement, reported in 1574 L.S.. This judgement is an illustration of the principle that, generally, Acts of Parliament were not construed so as to apply to the Isle of Man, rather than evidence that such Acts could not extend to the Isle of Man.

⁶See p.40; GELL J., "Opinion on the question of the proper constitutional authority to legislate for the Isle of Man and the Diocese of Sodor and Man.", (1981-3) *Manx L.R.* 399; BERRIEDALE K., Constitutional History of the First British Empire, [Oxford] (1930) 374; p.115; A.W. MOORE, 804; FLAHERTY M.S., "The Empire Strikes Back: *Annersley v Sherlock* and the triumph of Imperial Parliamentary Supremacy", (1987) 87 *Col.L.R.* 593.

Parliament enjoys the same broad powers in the Isle of Man as in England. Thus, Parliament would be able to pass statutes affecting any change in any area of law ¹. Two possible exceptions have been suggested. First, that Parliament may legislate only in the areas where it has traditionally legislated. Second, that Parliament cannot abolish the local legislature, Tynwald.

By convention, Parliament generally legislates only in certain clearly defined fields. In *Re Tucker* ², it was argued before the Staff of Government that a 1914 Act of Parliament did not extend to the Isle of Man, and that if Parliament purported to legislate for the Isle of Man in that matter it would be *ultra vires*. In other words, counsel contended that the legislative convention constituted a legal limit on Parliament. The contention failed, and there is no case-law to support it. The Chief Minister has recently accepted that Parliament can legislate contrary to constitutional convention ³. Accordingly, this limitation does not seem to apply.

The second limit has been put forward, albeit tentatively, by the Select Committee of Tynwald on Constitutional Law:

“it is open to question whether Parliament could abolish the legislative competence of Tynwald, since Tynwald does not derive its authority from Parliament” ⁴

This is a *non sequitur*. Parliament is not limited to amending existing statute law, but can change customary law. It would seem to follow that Parliament could alter the customary law giving Tynwald legislative authority, just as the English Parliament was able to alter the common law rule giving the English Parliament legislative authority, in favour of the Great British Parliament. It appears, therefore, that Parliament can legislate, in the Isle of Man, on any subject.

Until recently the English courts took the view that an Act of Parliament could effect legal change in any way whatsoever, rather than being required to meet special procedural requirements ⁵. It may be argued that this rule does not apply to the Isle of Man, and that Parliament needs to express itself in a special manner and form, by referring to the Isle of Man by name, if it intends an Act to extend to the Isle of Man. A number of important authorities appear to have resolved the issue.

¹See further, BRADLEY A.W. et al, Constitutional and Administrative Law, [London] (1985) 64-70.

² *Re Tucker* (1988) 11 Manx L.B. 33.

³ (1991) 17 Manx L.B. 5.

⁴ Fifth Interim Report of the Select Committee on Constitutional Law, [Douglas: By Authority] (1986) para. 2.6.

⁵This has been considerably complicated by recent developments in the application of E.C. law in English courts.

The appeal of *Christian*, discussed above ¹, made it clear that an Act of Parliament could apply without reference to the Isle of Man by name. Acts of Parliament could extend to the Isle of Man by necessary implication ². This category was less clear than those Acts which applied to the Isle of Man by name ³. The general principle was

“it should appear on the face of the particular Statute that the legislature intended it to apply to the Isle of Man and further that the intention should appear as clearly and unmistakably as if the Island were referred to by name.” ⁴

Three principles clarify this general rule. Firstly, it appears clear that where an Act extends to all dominions of the Crown, this includes the Isle of Man. This may be the best explanation of *Christian* ⁵. Secondly, where an Act which does not refer to the Isle of Man is to be construed with an Act which does extend to the Isle of Man, relevant sections extend to the Isle of Man. Thirdly, the courts may be more willing to find an Act in certain fields extends to the Isle of Man ⁶.

In conclusion, the courts look to the intention of Parliament, rather than requiring any special manner and form, when deciding whether an Act of Parliament extends to the Isle of Man. The courts search for clear expression of this intent is no more exceptional than, for instance,

¹See p.41.

²Bishop of Soder and Man v Earl of Derby, Earl of Derby v Duke of Atholl (1751) 2 Ves.Sen. 337. "Implication" is clearer to the modern reader than the older "consequence".

³See Lieutenant-Governor Hope to Under-Secretary of State of the Home Department, 10 June 1846 [P.R.O. - H.O. 45/ O.S. 1363].

⁴AG v Samuel Harris and John Mylrea, Justices (1894) Isle of Man Examiner 3 February (Chancery Division); (1894) Isle of Man Examiner 13 October (Staff of Government); Lieutenant-Governor Ridgeway to Under-Secretary of State, 2 September 1893 [Letterbooks 1893-4,218]; Lieutenant-Governor Ridgeway to Under-Secretary of State, 22 December 1893 [Letterbooks 1893-4,331]; Lieutenant-Governor's Clerk to High Baliff of Douglas, 15 January 1894 [Letterbooks 1893-4,349]; Lieutenant-Governor Ridgeway to Under-Secretary of State, 27 March 1894 [Letterbooks 1893-4,442]; Lieutenant-Governor Ridgeway to Under-Secretary of State, 11 April 1894 [Letterbooks 1893-4, 455]; Lieutenant-Governor Ridgeway to Under-Secretary of State, 25 September 1894 [Letterbooks 1893-4, 691]; Lieutenant-Governor's Clerk to the High Baliff of Douglas, 15 January 1894 [Letterbooks 1893-4,349]. In re Robinson (1936) reported YOUNG G.V.C., op.cit., (1978) 13;

⁵See p.41.

⁶It has been argued that where the King legislated in Parliament as head of the Church of England as a whole, that the Act extends to the Isle of Man - YOUNG G.V.C., op.cit., (1978). See also Burrows (1831) Manx Sun 2 August, Manx Sun 3 November.

the similar search when it is suggested that an Act takes away the property of a subject without compensation ¹.

The final possible limit on Parliamentary authority is related, not purely to the powers of Parliament, but to its relationship with Tynwald. In the United Kingdom, no body can gainsay an Act of Parliament ². It appears, however, that Tynwald has the power to legislate contrary to provisions of an Act of Parliament extending to the Isle of Man. Two sources provide support for this view - the practice of the legislature, and the decisions of the Manx courts.

Acts of Tynwald purporting to contradict Acts of Parliament would suggest such a power was vested in Tynwald. Clearly, for one organ in the constitution to exert power at the cost of another is not conclusive of the legal validity of that exertion. One factor does make that exertion particularly persuasive in this context. After Revestment no Act of Tynwald could be granted Royal Assent without the acquiescence of the British Sovereign, *de jure*, and the consent of the British executive and Law Officers, *de facto* ³. Thus, exertion of the power required the consent of key members of the other organ.

Of those Acts which are *prima facie* incompatible with Acts of Parliament, many are explicable without questioning the sole supremacy of Parliament. Of these, some merely repeal Acts of Tynwald which have adopted Acts of Parliament ⁴, albeit in a convoluted way ⁵. Others repeal Acts of Parliament by the authority of Parliament, rather than that of

¹Central Control Board v Cannon Brewery Co. [1919] A.C. 744 at 752.

²This was the general rule, and does not take into account the effect of European Community law, which is a statutory accretion to the common law structure.

³See p.18.

⁴See, from a wide selection, Merchant Shipping Act 1935 s.,2; Merchant Shipping Act 1951 s.1; Social Security Act 1982 s.1(1).

⁵Perhaps the best example of this is the pattern of customs and excise legislation to be found in the following Acts and Orders - Customs (Isle of Man) Act 1958 s.3; Customs and Excise (Application) Act 1975 s.1; Customs and Excise (Transfer) Act 1979 s.1; Customs and Excise Legislation (Application) Order 1976 (G.C. 1/76); Customs and Excise Legislation (Application) (Amendment) (no.2) Order 1976 (G.C. 58/76); Customs and Excise Legislation (Application) (Amendment) Order 1977 (G.C. 200/77); Customs and Excise (Transfer of Functions) Order 1980 (G.C. 29/80); Customs and Excise Act (Application) Order 1979 (G.C. 38/79).

Tynwald, whether expressly ¹, or by implication ². A third category make provisions supplemental to the Act of Parliament in question ³.

This leads onto the final category of legislation - Acts of Tynwald which repeal Acts of Parliament extending to the Isle of Man either directly, or by Order in Council ⁴. The Merchant Shipping Act 1981 schedule 3, enacted without query by the legislature ⁵, repeals a range of Imperial Acts extending to the Isle of Man. Two more recent examples provide the clearest and most unequivocal assertions of the co-ordination of Tynwald and Parliament.

The Child Custody Act 1987 s.54(1) effects a number of supplemental changes ⁶, but also effects what was clearly a repeal. The Imperial statute 1978 c.26 s.7(2) provided for extension and adaptation of its provisions to the Isle of Man by Order in Council. An Order was made extending the Act to the Isle of Man, with scheduled alterations. By paragraph 3 of the Schedule a new section 4(1)(a)(i) of the Order was provided, reading "sections 18, 20, 43, 44, 45, 69, 94 and 118 of the Criminal Code 1872". The Child Custody Act deleted the characters "69" from this subsection.

It may be argued that an Act of Parliament extended to the Isle of Man, with alterations, by Order in Council could be repealed by Act of Tynwald whereas an Act extending to the Isle of Man directly could not. This view is rebutted by the Merchant Shipping Registration Act 1991 s.79(1) which repealed 57 & 58 *Vict. c.60* 1-91, an Act of Parliament extending to the Isle of Man by virtue of s.91 of the Imperial Act. It was recognised by the legislature that the Act would repeal Acts of Parliament, but the ability of Tynwald to do so was not questioned ⁷.

¹6 & 7 Eliz.2 c.11 s.1(3); Import Duties (Isle of Man) Act 1958 s.1(1). See also Harbours Act 1961 s.60(2).

²Church Act 1961; Sir Henry Sugden, April 2 1968 [Debates 85,1388].

³See p.166; Liddell to Lieutenant-Governor Loch, 12 July 1871 [Letterbooks 19,84]; *Phillips v Eyre* (1870) L.R. 6 Q.B. 1; *Woolworths NZ (Ltd) v Wynne* [1952] N.Z.L.R. 496; *Nadan* [1926] A.C. 482; *Attorney General for Queensland v Attorney General for the Commonwealth* (1915) 20 C.L.R. 148; Consumer Protection (Trade Description) Bill 1970 [Legislative Council, 2 June 1970; Debates 87,1699].

⁴See p.49.

⁵See Mr. Quinney during the Second Reading of the Bill in the House of Keys, 29 April 1980 [Debates 97, K418].

⁶15 & 16 Geo.6 & 1 Eliz.2 c.67 sch.(b); 1978 c.17 s.1(5). This is the author's view, but the provisions are open to other interpretations, and so they are not relied upon on this point.

⁷See Dr. Orme, Second Reading in the House of Keys, 30 April 1991 [Debates 108. K1506]; Attorney General, Third Reading in Council, 25 June 1991 [Debates 108, C460].

It thus appears that, in the later part of the twentieth century, the Manx legislature began to exercise, with the acquiescence of the British Crown and executive, a legislative authority coordinate with that of Parliament. It is worth stressing not only that previous legislative patterns failed to indicate such a power, but official correspondence emphatically indicated it did not exist ¹. It is useful, given the exceptional nature of this practice, and its relatively recent acceptance, to consider judicial authority on the point.

The problem has only been considered this century, and then as *obiter dicta*. The explanation of this lies in the pre-enactment consideration of Manx legislation by the British Law Officers ², combined with the practice of informally dividing areas between Tynwald and Parliament ³. If Parliament and Tynwald legislated in separate areas potential clashes would be rare. If the Law Officers further refused to recommend Royal Assent to any Act of Tynwald which, upon its face, was contrary to an Act of Parliament, the possibility of conflict would be reduced still further.

The traditional view, that Tynwald cannot legislate contrary to Parliament, appeared in *Re Robinson* ⁴. In that case, before Deemster Farrant in the Chancery Division, the general question was the extent to which Acts of Parliament relating to ecclesiastical matters extended to the Isle of Man. In a passage which, on this point, was *obiter dicta*, Deemster Farrant noted:

“it is however not contended, if as a fact Imperial Acts and Measures do apply to the Island either in whole or in part, that the Insular Legislature could effect any limitation or alteration of that application. In my opinion the Insular Act is only important in

¹See Consumer Protection (Trade Description) Bill 1970 [Legislative Council, 2 June 1970; Debates 87,1699]; Lieutenant-Governor Loch to Secretary of State of the Home Department, 4 June 1870 [Letterbooks 17,17]; p.165; Riddell to Lieutenant-Governor Loch, 28 December 1870 [Letterbooks 17,656]; Attorney General Gell to Lieutenant-Governor Loch, 11 January 1871 [Letterbooks 18,37]; Liddell to Lieutenant-Governor Loch, 9 August 1876 [Letterbooks 30,515]; Lieutenant-Governor Loch to Under-Secretary of State, 12 August 1876 [Letterbooks 30,549]; Liddell to Lieutenant-Governor Loch, 16 August 1876 [Letterbooks 30,559]; Attorney General Gell to Lieutenant-Governor Loch, 7 October 1876 [Letterbooks 31,90]. Lieutenant-Governor Loch to Secretary of State, 9 October 1876 [Letterbooks 31,101]; Ibbetson to Lieutenant-Governor Loch, 5 January 1877 [Letterbooks 31,368]; Attorney General Gell to Lieutenant-Governor Loch, 16 January 1877 [Letterbooks 31,391]; Kilbrandon Report, (1973) Minutes of Evidence 6,81. See, for comparison, the question of whether the legislature of Guernsey could repeal an Act of Parliament extending to Guernsey - Law Officers Report, 10 November 1881 [P.R.O. - P.C. 8/260].

²See p.16.

³See p.51.

⁴In *Re Robinson* (1936) reported in YOUNG G.V.C.,op.cit., (1978) 13; Kilbrandon Report, (1973) 1486.

considering the practicability of applying any provision of the Imperial Act or Measure to the local circumstances of the Island”.

The alternate view was put forward in *Re C.B. Radio*¹, a landmark decision of the Staff of Government Division. The Attorney General had petitioned for an order to condemn goods seized by customs officials, said petition being granted by the High Court, and the owner appealed to the Staff of Government Division. The import prohibition was made by order of the Manx Finance Board, under an Act of Tynwald, and one ground of appeal was that the Order was void due to conflict with 1967 c.72. To be exact, the Order purported to extend a provision of that Act to the Isle of Man, when the power to do so had been vested in the Queen in Council under s.15(6) of the Imperial Act, and in any case the Order was inconsistent with an Order in Council made under the Act in 1981². The Attorney General argued that the power given to the Queen in Council under the Act did not exclude any other competent legislative body from extending the provisions, as it merely gave the Queen the power to do so, and that there was no conflict between the insular Order and the Order in Council. Hytner J.A. delivered the judgement of the Court, the relevant section of which states:

“Since [the consent of the Sovereign] is required before Acts of either legislature become law *it must follow that the later Act (whether of Tynwald or Parliament) must prevail...* The section merely empowers Her Majesty at his discretion to extend s.7 of the Act to the Island by Order in Council. It does not preclude Parliament itself from doing so, nor does it preclude any other competent legislative body, namely Tynwald, from doing so... Nor can we accept that any conflict exists between the legislation passed at Westminster and that passed in the Island”.³

It seems clear that, while the latter part of the text addressed points raised by counsel and necessary for the decision, the first sentence was merely *obiter dictum*. Nonetheless, after this decision Tynwald legislated in such a way as clearly to repeal or amend Acts of Parliament.

It is useful to summarise the authority of Parliament in the Isle of Man. Parliament has been able to legislate for the Isle of Man since before Revestment. The legislation can deal with any subject, and does not have to be expressed in a special manner and form, although the intention of Parliament to legislate for the Isle of Man must be clear. The legislation can repeal Acts of Tynwald, but is subject to repeal by such Acts. This is the case in any area, as

¹Re C.B. Radio (1981-3) Manx L.R. 381; Second Interim Report of the Select Committee of Tynwald on the Constitution, (1981) 6.2.

²Wireless Telegraphy (Isle of Man) Order 1981.

³Emphasis added.

Tynwald can deal with any subject matter, even subjects which transcend the frontiers of the Isle of Man ¹.

While the authority of Parliament in the Isle of Man supreme, albeit shared with the insular legislature, it would be unwise to assess the practical authority of Parliament on the basis of the strict legal rules alone. Rather, this is an area where convention is vitally important.

Conventional Limits.

In 1991 Parliament passed an Act to revise the statute law of the Isle of Man by repealing obsolete, spent, and unnecessary Acts of Parliament extending to the Isle of Man ². The Bill was prepared by the Attorney General's Chambers in the Isle of Man, and as part of the process the draftsman, Gumbley, considered all the legislation extending to the Isle of Man, producing useful reference material in the process ³. Gumbley divided the majority of the statutes into a number of categories - constitutional law, mutiny acts, expiring laws continuance acts, foreign affairs, war and emergency, ecclesiastical matters, trade, slave trade, and a category of purely Manx acts of Parliament ⁴, such as the Act settling the Isle of Man on the Earl of Derby in 1610. He summarised his findings on the subjects and volume of legislation with a clarity that merits full quotation ⁵:

“Before the seventeenth century such legislation dealt with little but matters of state, such as the succession of the Crown, and of course ecclesiastical affairs, which at the time had great constitutional significance. After the [English] Civil War the subject-matter of such legislation widened to include trade and military matters, and after the Revestment of 1765 was further extended to customs and excise and the import and export of goods. The high tide of "imperial" legislation for the Isle of Man was during the period from 1860 to the end of the First World War and (apart from the Second World War) the subsequent period has seen a gradual transfer of responsibility from Parliament to Tynwald in many areas.” ⁶.

This view is supported by even a crude consideration of the number of pieces of legislation passed affecting the Manx jurisdiction. Because of the increase in legislation in the twentieth century figures after 1900 are given in twenty year bands, as opposed to the fifty year bands used before 1900. The table below shows the number of Acts of Parliament extended to the

¹The only exception to this, which is of little more than academic interest, is the identity of the Lord of Man. It is submitted, for the reasons discussed at p.41, that such determination may not be made by Act of Tynwald.

²1991 c.61.

³See GUMBLEY K.F.W.,Statute Law Revision (Isle of Man) Bill: Notes on the Bill, [Unpublished] (1990); GUMBLEY K.F.W.,Isle of Man Orders in Council, [Douglas](1986); GUMBLEY K.F.W.,Chronological Table of Acts of Parliament Extending to the Isle of Man with subject guide, [Douglas](1992).

⁴GUMBLEY K.F.W., "A Note on the Statute Law Revision (Isle of Man) Act 1991", (1991) 17 Manx L.B. 72.

⁵See also Lieutenant-Governor Walpole to Home Office, 9 August 1873 [M.M.A. G 23/29]

⁶GUMBLEY K.F.W.,op.cit., (1991).

Isle of Man during each period, the number of Acts of Tynwald passed during the same period, and the number of Acts of Tynwald as a percentage of the number of Acts of Parliament.

Table Two: Absolute and Relative Numbers of Acts of Parliament and Acts of Tynwald, 1351-1990.

Period	AoP	AoT	%
1351-1400	2	0	∞
1401-1450	2	8	25
1451-1500	5	0	∞
1501-1550	43	3	1443
1551-1600	43	13	330
1601-1650	18	16	112.5
1651-1700	27	19	142
1701-1750	84	37	227

1751-1800	236	41	576
1801-1850	471	84	561
1851-1900	442	336	131.5
1901-1920	212	209	101
1921-1940	187	423	44
1941-1960	205	427	48
1961-1980	279	450	62
1981-1990	110	257	43

Just as the general pattern of parliamentary legislation changed, so did the mode by which parliamentary authority extended to the Isle of Man ¹. Before the First World War, Acts extended to the Isle of Man either by necessary implication ², or by a clause within the Act ³. With the coming of war, however, a general power to extend Acts of Parliament to the Isle of Man by Order in Council was created by statute ⁴. Later, the general practice was to include an enabling clause, allowing the Act in question to be extended to the Isle of Man, with

¹See Kilbrandon Report, (1973) Minutes of Evidence 6,71 per Joint Evidence of the Home Office and Tynwald.

²See p.44.

³eg. 63&64 Vict. c.56 s.27.

⁴4&5 Geo.5 c.62. Repeated in World War Two by 2&3 Geo.6 c.86.

alterations, by Order in Council ¹. The older form of direct application was still used when appropriate ².

In explaining these changes it may be that, although Parliament could legislate in any field ³, a constitutional understanding of some kind was perceived as restricting the proper exercise of this power. In other words, the limited pattern of legislation may have flowed from a constitutional convention ⁴.

Merely identifying such a convention is not an adequate explanation of Parliamentary quietism. Conventions are not legal rules which may be relied upon in all circumstances. Rather, a convention is "a generally accepted political practice, usually with a record of successful applications of precedents" ⁵, violation of which may, depending upon the circumstances, result in a constitutional crisis, political damage, or the removal or modification of the rule ⁶. If a convention of quietism was not supported by some good reason, it was unlikely to endure.

Nonetheless, the existence or otherwise of a constitutional convention is important. The parties to the convention may follow it without any deeper consideration of the issues raised or, if the issue is controversial, be deterred from pursuing a course of action by the existence of the convention. Accordingly, it is important to resolve this issue.

The Kilbrandon Commission, which received submissions from Tynwald and the Home Office, the parties most likely to rely upon, or be bound by, the convention found that some form of convention did exist. By convention, Parliament did not legislate for the Isle of Man without its consent in matters of purely domestic concern, Parliament legislating only on

¹GUMBLEY K.F.W., "Extension of Acts of Parliament to the Isle of Man by Order in Council", (1987) 8 Manx L.B. 78.

²It was not uncommon for an Act of Tynwald to apply an Act of Parliament to the Isle of Man, or enable some other body to do so, for instance, with the Social Security Act 1982 s.1(1). This extension was by the authority of Tynwald, rather than Parliament, and so need not be considered here.

³See p.42.

⁴It is a moot point whether this convention should be considered a convention of the Manx constitution, or of the British, or of both.

⁵M'KINTOSH J.P., The British Cabinet, [London] (1977) 13. It may be argued that 'convention' should be used more rigorously, in terms of the criteria found in some constitutional law textbooks. This text does not distinguish between non-legal rules of the constitution in that way.

⁶See generally, MARSHALL G., Constitutional Conventions: The Rules and Forms of Political Accountability, [Oxford] (1986).

matters transcending the frontiers of the Isle of Man ¹. The Commission recognised that the convention was fluid ², and indeed the willingness of Parliament to legislate appears to have declined after the Commission reported in 1972 ³. Before considering these developments, it is useful to identify the growth of the convention.

Conventions are notoriously difficult to place in time. In retrospect, it may be possible to identify the last time Parliament legislated contrary to the convention, but this would not indicate the date upon which constitutional actors believed such legislation would have been improper. A better source for resolving this issue is the correspondence between the Lieutenant-Governor, at one time the centre of the Insular administration, and the Home Office, the Imperial body with primary responsibility for the Isle of Man.

Despite the pattern of legislation noted above, it was not until the late nineteenth century that evidence of such a convention could be found in official correspondence. This was, perhaps, to be expected, as it was not until this period that Parliament became active in legislating for the Isle of Man, threatening to encroach into novel areas.

In 1870 Lieutenant-Governor Loch noted “it has been unusual for the Imperial legislature to legislate for the Isle of Man in matters of purely internal regulation” ⁴. In the succeeding decade, the Lieutenant-Governor became more emphatic in distinguishing between “matters of internal regulation [which] can be and have always been dealt with sufficiently by the Insular legislature” ⁵, and matters which Tynwald could not legislate upon, which were suitable subjects for Imperial legislation ⁶. A distinction between insular matters, best dealt with by Tynwald, and “questions affecting Imperial policy ... better dealt with by Imperial ... legislation” ⁷ was developing and being defended.

Possibly the best example of this concerned Parliament's Burial Bill, which was intended to extend to the Isle of Man. Lieutenant-Governor Loch, with the support of the House of Keys, objected to the extension upon purely constitutional grounds. The Bill itself was

¹Kilbrandon Report, para. 1362.

²*ibid*, 1373-6.

³See p.51.

⁴Lieutenant-Governor Loch to Under Secretary of State, 5 June 1870 [Letterbooks 17,17].

⁵Lieutenant-Governor Loch to Under Secretary of State, 13 February 1875 [Letterbooks 27,266]

⁶Lieutenant-Governor Loch to Under Secretary of State, 13 March 1876 [Letterbooks 29,334]; Lieutenant-Governor Loch to Secretary of State, 17 February 1881 [Letterbooks 36,649].

⁷Lieutenant-Governor Loch to Attorney General Gell, 3 April 1876 [Letterbooks 29,492].

unobjectionable, as could be seen by the willingness of the Lieutenant-Governor to introduce a Bill to the same effect in Tynwald ¹. Rather, they objected to:

“questions that can be settled by the local legislature being dealt with by the Imperial Parliament in which the people of this Island are unrepresented ... to include the Isle of Man in an Imperial Act, save with the consent of the Insular legislature, is opposed to what they claim to be their constitutional rights and privileges” ².

The convention which had developed by the end of the nineteenth century was as follows. If Tynwald were able to legislate for an area, it was to be allowed to do so, and Parliament ought not legislate in that area. If Tynwald were unable to legislate, either because it would be *ultra vires* that body, or impractical due to the topic being extra-insular in scope, then it would be proper for Parliament to legislate ³.

The Kilbrandon Commission, reporting in 1972, identified the instances when it would be appropriate for Parliament to legislate in the Isle of Man ⁴. Three instances are readily identifiable as fitting the nineteenth century convention - defence, matters of common concern to British people throughout the world, and the international responsibilities of the United Kingdom. The Commission also included the interests of the Isle of Man, and the domestic interests of the United Kingdom, as justifying Parliamentary action ⁵. This was probably not such an innovation as it may appear, as the Commission was attempting to lay down the convention in a relatively formal way, thus dealing with issues not raised in practice.

After the Commission reported, the view developed that Tynwald was able to legislate in any field, even contrary to an Act of Parliament ⁶, and so that aspect of the convention would appear to have become defunct. The scope of issues regarded as extra-Insular also narrowed, with Tynwald importing responsibility for areas such as merchant shipping and intellectual

¹Memorandum of Lieutenant-Governor Loch, 9 July 1880 [Letterbooks 36,204]; Lushington to Lieutenant-Governor Loch, 13 July 1880 [Letterbooks 36,215]; Lieutenant-Governor Loch to Secretary of State, 14 July 1880 [Letterbooks 36,226].

²Memorandum of Lieutenant-Governor Loch, 9 July 1880 [Letterbooks 36,204].

³See Lieutenant-Governor Loch, 9 March 1869 [H.O. 45/O.S. 7115]; Lieutenant-Governor Loch, 20 March 1869 [H.O. 45/O.S. 7115]; Lieutenant-Governor Ridgeway, 12 March 1895 [H.O. 45/9977/X4695A]; Lieutenant-Governor Walpole, 16 April 1883 [H.O. 45/9524/228724].

⁴Kilbrandon Report, para. 1513.

⁵It may be better to combine these categories into a single class where legislation is justified by the interests of all subjects of the Crown.

⁶See p.45.

property, formerly considered the responsibility of Parliament. Nonetheless, the convention remains.

We must turn now to consider the reasons why Parliamentary legislation is generally unsuited for the Isle of Man - the reasons underpinning the convention. We will consider the most problematic situation first; where an Act of Parliament applying to England is extended to the Isle of Man by a clause within the statute. The other options, an Act intended purely for application to the Island, or an Act extended to the Island with modifications by Order in Council, are considered later.

A significant problem is the almost inevitable interaction between the Act of Parliament and the insular legal system. Unless the Act is self-contained, such as a scheme for the registration of births, and created its own enforcement mechanisms, it has to fit into an existing legal structure, and local mechanisms may be required.

This interaction can lead to a loss of clarity, where research into a legal matter might require consideration of both the English and Manx statute books, and reconciling the two ¹. The ultimate consequence of lack of clarity is error, as demonstrated by *7 Will.4 & 1 Vict. c.45*. It was discovered in 1870 that this Act of Parliament applied in the Isle of Man, although the Manx were unaware of it, and its provisions had never been complied with. A measure was required to legalise a number of proceedings, post 1837, invalidated by the Act ².

Additionally, an Act could simply fail to interact in a sensible way with existing Manx law ³. A good example of this occurred where a procedure was possible, by Imperial statute, only upon the issuing of a certificate by a Registrar of Deaths, no such official having jurisdiction over the Isle of Man ⁴.

Interaction problems can be dealt with by good drafting. Unfortunately, those drafting Acts of Parliament have not had, *ex officio*, any special knowledge of Manx law, and were frequently unable to recognise the problems raised by local conditions. To some extent this has been countered by the willingness of the Insular authorities to propose amendments to

¹See Mr. Kerruish in his letter to the Home Office, 3 February 1912 [H.O. 45/10501/120695]; Liddell to Lieutenant-Governor Loch, 12 July 1871 [Letterbooks 19,84].

²Lieutenant-Governor Loch to Secretary of State, 4 June 1870 [Letterbooks 17,17].

³See Lieutenant-Governor Loch to Under-Secretary of State, 11 April 1881 [Letterbooks 37,56]; Liddell to Lieutenant-Governor Loch, 25 April 1881 [Letterbooks 37,93].

⁴Treasury to Lieutenant-Governor Loch, 21 March 1876 [Letterbooks 29,405]; Deemster?, 2 March 1861 [H.O. 45/ O.S. 7115]; Attorney General Gell to Lieutenant-Governor Walpole, 28 March 1883 [Letterbooks 39,266].

Bills were required ¹. Obviously, the more influence the insular legislature, or members thereof, have over the exact terms of the Act, the more likely drafting is to avoid problems of interaction.

As well as these practical problems, the special relationship between Parliament and the Isle of Man, as opposed to Parliament and the United Kingdom, suggests that, where possible, legislation ought to be left to Tynwald.

First, Parliamentary legislation reduces the authority of Tynwald. This was clearest when it was believed that Tynwald could not legislate contrary to an Act of Parliament ², and so an Act of Parliament removed the power of Tynwald to enact contrary provisions in that area ³. In a looser, conventional sense increased Parliamentary legislation weakens the convention against legislation, and creates a dangerous precedent. This viewpoint has been acknowledged by Tynwald ⁴. Thus, a government generally willing to allow a degree of Manx autonomy might be reluctant to legislate.

Second, the Isle of Man has never been represented in the Imperial Parliament ⁵. Accordingly, an Act of Parliament lacks democratic justification. An Act of Parliament is legislation without representation, and capable of causing political embarrassment.

Third, if the Imperial government actually desired specific legislation to take effect in the Isle of Man, until the late twentieth century less obtrusive and easier methods than an Act of Parliament were available. From a purely practical viewpoint, a Bill in Parliament could cause attention to focus on the Isle of Man at a national level, as well as taking up Parliamentary time.

¹eg. Lieutenant-Governor Loch to Under-Secretary of State, 1 April 1879 [Letterbooks 35,237]; Attorney General Gell to Lieutenant-Governor Loch, 29 April 1879 [Letterbooks 35,284]; Lieutenant-Governor Loch to Under-Secretary of State, 29 April 1879 [Letterbooks 35,288]; Lieutenant-Governor Loch to Under-Secretary of State, 14 June 1879 [Letterbooks 35,348]; Lieutenant-Governor Walpole to Under-Secretary of State, 21 August 1882 [Letterbooks 38,353]; Lieutenant-Governor Walpole to Home Office, 9 August 1873 [M.M.A. G.O. 23/29].

²See p.45.

³See Report of the House of Keys Select Committee on the Sexual Offences Bill, 26 March 1991 [Debates K1273].

⁴See p.24.

⁵The natural person who was Lord of Man before Revestment may have been a member of the House of Lords, and after Revestment was the British Sovereign, but no formal representation was available in the Lords or Commons. Even the Bishop of Sodor and Man was unable to become a Lord Spiritual.

Some of these factors apply with less force to Acts passed to change Manx law alone ¹. The Act would tend to be tailored to the needs and special features of the jurisdiction, although the basic problems of legitimacy would remain. Similarly, where an Act is extended with modifications under an Order in Council, the general provisions could be altered to effect the desired end in the Isle of Man, often with the active participation of the insular legislators ².

The Juristic Basis for Parliamentary Authority.

Having established the rules governing Parliamentary authority in the Isle of Man, it seems worthwhile to consider the juristic basis for this authority. There would appear to be two possible explanations - that an Act of Parliament is an expression of the will of the Lord of Man, deriving authority from the local constitutional position of the Lord; and that an Act of Parliament is an expression of the will of the British Sovereign.

To consider the first: three decisions of the Staff of Government Division appear to support this view. In *Crookall v Isle of Man Harbour Board* ³ Hytner J.A. stated, in relation to two Acts of Parliaments whose extension to the Island was never in question, that he was “satisfied that insofar as they sought to legislate for the Isle of Man, the statutes were effective since the King as Lord of Man was exercising by delegation his prerogative powers”. In *Re C.B. Radio* ⁴, where the constitutional issue was more directly in point, but still not central to the discussion, the same Judge of Appeal stated that:

“[the appellant’s advocate] postulated the difficulties which would arise if neither legislature were supreme and there was a clear conflict between an Act of Parliament and an Act of Tynwald. We can, however, see no difficulty at all as long as the Lord of Man remains the same person as the United Kingdom Sovereign. Since her consent is required before Acts of either legislature become law, it must follow that the later Act (whether of Tynwald or of Parliament) must prevail.”

A later case accepted the theory without adding to it ⁵.

There are serious flaws with this theory, developed although it has been by the Manx appellate court. The most significant is the failure to explain the legislative authority of

¹eg. 1991 c.61.

²See GUMBLEY K.F.W., "Extension of Acts of Parliament to the Isle of Man by Order in Council", (1987) 8 Manx L.B. 78.

³ *Crookall v Isle of Man Harbour Board* (1981-3) Manx L.R. 266.

⁴ In *Re C.B. Radio* (1981-3) Manx L.R. 381.

⁵ In *Re Tucker* (1988) 11 Manx L.B. 33.

Parliament before 1765. If Parliamentary authority is based upon the Lordship of the Island being vested in the English Sovereign, it is difficult to explain legislation before Revestment.

More principled problems lie with the concept that an Act of Tynwald, and presumably, an Act of Parliament, is a mere delegation of legislative power from the Crown. The distinction between strict theory and legal rules is well drawn out by Marshall in his commentary on Parliamentary Sovereignty in the Commonwealth, who said:

“The seventeenth century struggle between Crown and Parliament, which in one sense it would be true to say established the constitutional doctrine of Parliamentary authority did not, in the most formal plane, eradicate the theory that it is the will of the monarch which is enacted in Parliament”¹

The struggle referred to established in England, as had been noted earlier by Fortescue, that the ultimate law-making authority sprang, not from “the sole will of the Prince, but with the concurrent consent of the whole Kingdom by their representatives in Parliament”². The mere will of the Sovereign is not enough: what is required is the corporate act of the Sovereign-in-Parliament³. By the time of Revestment, a similar view of the legislative power of the Lord of the Isle of Man had developed. Arguably, it was more a matter of form than of substance, since it lay within the remit of the Lord to appoint and remove all members of the legislature. Nonetheless, in 1690 Deemster Parr wrote: “And noe law is to bee enacted without the consent of the 24 Keys who represent the countrey party”⁴. Similarly, under the Manx constitution the Lord of the Island was unable to impose customs without the consent of Tynwald, so it is difficult to attribute the Parliamentary power to do just that to the powers of the Lord¹ - *nemo dat non quod habet*.

The second explanation, and one which explains the authority of Parliament before 1765, is that Parliamentary authority derives from the position of the British Sovereign as suzerain and ultimate ruler of the Isle of Man. The legislative power that Parliament enjoys in the other dominions of the Crown applies to the Isle of Man, and applied even when the majority of interests in the Isle of Man were granted to a subject conditional upon service.

¹ Marshall G., Parliamentary Sovereignty and the Commonwealth, (Oxford: Clarendon Press, 1957).

² Fortescue J., De Laudibus Legum Angliae, (Cambridge, 1644) cited in Marshall G., op.cit., 48.

³ See, *inter alia*, Stockdale v Hansard (1839) 9 A&E 1; Bowles v Bank of England [1913] 1 Ch. 57; Cases of Proclamations (1611) 12 Co.Rep. 74.

⁴ Parr’s Abstract, para. 61.2.

One obvious problem with relying on the general authority of the Crown is explaining the coordinate authority of Tynwald and Parliament. The derivation of Tynwald's authority from customary law, rather than an Act of Parliament, is less useful in explaining this than might be anticipated. Dominion legislatures, which were inferior to Parliament, were not considered delegates of that body ², and it could be argued that Tynwald derives authority by Crown sufferance, analagous to express empowerment by Act of Parliament. More useful, on the other hand, is the absence of any limitation on Tynwald's authority under customary law. Because of the special position of Tynwald, it is unaffected by limits based upon the empowering statutes of other dominion legislatures, or importation of English principles of law by settlers, or Imperial legislation dealing with overseas dominions. Thus, it may be argued, the sole supremacy of Parliament is not a general principle applicable to all dominions of the Crown, but rather a doctrine existing separately in many of the dominions of the Crown, but not in the Isle of Man. This explanation is viable, and to be preferred, as it is compatible with the broader view of Roberts-Wray on the law of the overseas dominions of the Crown:

“The Sovereignty of Parliament is not world-wide, and its powers overseas stem (with the possible exception of settlements) from those vested in the Sovereign, by whom Acts of Parliament are enacted. The reason why Acts of Parliament may be made for ceded, conquered or annexed colonies is that they have been acquired by the Crown”

Finding Acts of Parliament.

Compared with Acts of Tynwald, texts of British statutes and statutory instruments have always been easily available, but it has often been difficult to determine their application to the Isle of Man. Lieutenant-Governor Henniker-Major, writing in 1897, neatly summed up the situation before 1975. The Consul General for Belgium had written to him requesting copies of Manx and English Acts in force in the Isle of Man. He replied:

“as regards Imperial Acts which may in whole or in part, by express words or possibly by implication extend to the Island, there is no list extant, such Acts are to be found scattered through the Imperial Statute books, indeed the application of some is a matter upon which many lawyers differ” ³.

¹ Moore G.E., “The Effect of the Act of 1765”, (1964-6) IOMNHAS(P) 7,35.

² Burak (1878) 3 App .Cas. 880; Hodge (1883) 9 App.Cas. 117.

³Lieutenant-Governor Henniker-Major to Consul General for Belgium at Liverpool, 2 December 1897 [Letterbooks 1896-8,488].

The situation has been ameliorated by the publication, in 1975 and again in 1992, of a guide to Acts of Parliament extending to the Isle of Man ¹; the collection of Orders in Council extending Acts to the Isle of Man in a folder at the General Reference Library ²; and the publication of a guide to secondary legislation extending to the Isle of Man ³.

Orders in Council.

As well as Tynwald and Parliament, the Privy Council may retain some legislative authority in the Isle of Man. There are few possible examples of such legislative authority actually being exercised, but they may remain legally possible today.

Legislation by Order in Council.

The British Crown may also have enjoyed a legislative power in the Isle of Man, although there is no evidence that this power was ever exercised. The possibility is worth briefly discussing as, if such a power exists, it may provide a direct means for the British executive to effect legal change in the Isle of Man.

The British Crown possesses, upon conquest of a territory, the power to legislate by Order in Council ⁴, letters patent or charter ⁵, or possibly order under the sign manual or the mere expression of will of the relevant Secretary of State ⁶. This power may be exercised in any field ⁷, so long as it is not used to create laws contrary to the fundamental principles of English law ⁸. Three grounds have been put forward as excluding this general Imperial power in the Isle of Man.

¹YOUNG G.V.C., Subject Guide to the Acts of Parliament Extending or Relating to the Isle of Man 1350-1975, [Douglas] (1978); GUMBLEY K.F.W., Subject Guide to Acts of Parliament Extending or Relating to the Isle of Man 1350-1992, [Douglas] (1992).

²GUMBLEY K.F.W., Orders in Council Extending Acts of Parliament to the Isle of Man, [Unpublished] (1991).

³YOUNG G.V.C., Subject Guide to the Subordinate Legislation of the United Kingdom Relating to the Isle of Man, 1765-1975, [Douglas] (1978).

⁴Forbes v Cochrane (1824) 2 B.&C. 448.

⁵Campbell v Hall (1774) 1 Cowp. 205.

⁶Cameron v Kyte (1835) 3 Knapp. 332.

⁷Abeyesekera v Jayatilake [1932] A.C. 260.

⁸Campbell v Hall (1774) 1 Cowp. 204; cf. ALLEN J., Inquiry into the Rise and Growth of the Royal Prerogative in England [London] (1844).

First, it has been suggested that the power was allowed to lapse in the Isle of Man soon after entry into the Crown dominions ¹. It is to be queried whether the failure of the Crown to exercise a prerogative power can cause the demise of that power - the better view is that mere desuetude cannot result in the loss of a prerogative power ². Second, it has been suggested that the power was lost upon the grant of the Isle of Man to a vassal ³. The grants of the Isle of Man to the vassal Kings do not refer to this power, but it may be argued that such a reduction in the power of the grantor is implied. It would appear, if that was the case, that the power was restored upon Revestment. The third restriction is more plausible, and merits further discussion.

In *Campbell v Hall* ⁴ it was decided that when the Crown granted a representative legislative body to a conquered dominion, without expressly reserving the prerogative power of legislation, it was barred from legislating in non-constituent fields, such as criminal law. Although the House of Keys was originally representative in a non-democratic sense ⁵, after 1866 the House of Keys was an elected assembly ⁶. It could be argued that, by consenting to the reforming Act of 1866, the Crown barred itself from exercising this power ⁷. This point cannot be resolved from authority, but it is important to note that the Imperial authorities did not discuss this point when deciding whether to approve the constitutional changes of 1866. It is submitted, albeit tentatively, that this power was not restricted by the Act of 1866.

That is not to say that exercise of this power would have been constitutionally acceptable after 1866. The point is well illustrated by reference to the discussion, in 1927, of whether the Crown could extend an Act of Parliament to Guernsey by Order in Council, where the Act

¹see GELL J., "Opinion on the question of the proper constitutional authority to legislate for the Isle of Man and the Diocese of Soder and Man", [1981-3] Manx L.R. 399; *Campbell v Hall* (1774) 1 Cowp. 204; cf. ALLEN J., op.cit., (1844) 23-4.

²MAITLAND F.W., Constitutional History of England, [London] (1908) 418.

³GELL J., op.cit..

⁴*Campbell v Hall* (1735) 1 Cowp. 204.

⁵This is the most charitable construction. Although the Keys claimed to represent the people of Mann, by the time of constitutional reform in 1866 they are better viewed as a self-perpetuating oligarchy.

⁶See p.136.

⁷This argument was put forward by the States of Jersey in their submission to the Kilbrandon Commission - see Kilbrandon Report, (1973) Minutes of Evidence 6, Annex A. The prerogative legislative power in Jersey is arguably unique, being derived from the powers of the Duke of Normandy before the Norman Conquest - see Kilbrandon Report, (1973) Minutes of Evidence 6,13.

itself contained no such provision ¹. It was argued that this was not possible, and the Isle of Man (War Legislation) Act 1914 was cited in support - that Act provided for Orders in Council to extend Acts of Parliament to the Isle of Man, and would have been redundant if any such inherent power existed. It was then suggested that an Order in Council could extend the Act if accepted as prerogative legislation, but that,

“it would [not] be desirable in these times to revive a form of legislation by prerogative without reference to Parliament, which seems to have fallen into disuse, ... without careful consideration.” ²

Disallowance by Order in Council.

The Crown also enjoyed another, more specific, legislative power which *was* exercised earlier this century. As a general rule of Imperial constitutional law, the Crown is able to disallow the legislation of dominion legislatures, other than the Imperial Parliament ³. Because Acts of Tynwald after 1765 required the assent of the British Crown ⁴, refusal of Royal Assent is occasionally referred to, inaccurately, as disallowance ⁵. Disallowance proper, by which is meant the negation of an Act of Tynwald by a later Order in Council deriving authority from the prerogative, rather than an Act of Parliament, was extremely rare. The only example this author is familiar with, which contains indications that it was indeed unique, is the Companies Act 1900.

The Act had passed all stages of legislation "and the Order in Council [had] actually been made approving it, and ... [was] ... lying in the [Home Office]" when objections were first raised. These were sufficiently persuasive to render the Act undesirable, and the question arose as to whether it could be annulled. K. Digby noted:

“We can find no precedents of a revocation of an Order in Council with reference to Isle of Man legislation but there are abundant cases of alteration and variation of other Orders in Council”

The Manx and English Law Officers agreed that the Act could properly be dealt with, since it had not been promulgated and so was not law, by the Order granting assent being repealed by

¹This case, while valuable, should be used with some caution, as the legislative power in the Channel Islands is unique - Kilbrandon Report, (1973) Minutes of Evidence 6,13.

²C. Smith to C.H. Martin-Jones, 24 September 1927; C. Smith to S.J. Badler, 25 February 1928; S.J. Badler to C. Smith, 17 July 1928; Filenote, 18 July 1928 [P.R.O. - P.C. 8/1146].

³ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966).

⁴See p.18.

⁵See Council Office to J. Cornwall Lewis, 2 April 1849 and 3 May 1849 [H.O. 45/ O.S. 2904].

another Order ¹. This leaves open the question of whether an Act of Tynwald could be disallowed after it had become law which, given the changes in the law relating to promulgation ², now means after Royal Assent had been granted. On the basis of general principles of the Crown Dominions, it seems probable that such an Act could be disallowed.

Secondary Legislation.

As in the United Kingdom, a very wide variety of bodies have been empowered by primary legislation, to enact regulations and other forms of secondary legislation. The general term now used is Statutory Document, the older term of Government Circular now being used for different documents. Statutory Documents are important in many areas, and somewhere in the region of 600 become law each year.

Finding Secondary Legislation.

There is a serious lack of an authoritative collection of SDs. Many government Departments have collections of SDs in their areas, but even these are rarely amended in the text. The best general collection is at the Tynwald Library, which has copies of all SDs issued each year, as well as an outdated, but useful, subject guide. Better subject guides are compiled for some popular areas of legislation, and sold with collections of the relevant Acts. The best source for keeping track of current developments is the *Manx Law Bulletin*, although more timely lists are sometimes available from Tynwald Library or, less reliably, by studying the Tynwald agenda, which includes some forms of SD coming up for approval.

Interpreting Statutes.

As a general rule, the Manx courts adopt the rules developed in the English jurisdiction when interpreting statutes, whether those of Tynwald or Parliament, and cases on statutory interpretation, as well as learned texts, are cited in Manx courts. This section will briefly discuss some particularly Manx points of interpretation.

Understanding the Context: Case-law on English Statutes.

There is considerable discussion below on the correct approach to take to English authorities on points of Manx customary law. Before discussing the factors which may be relevant to

¹Lord President of Council to Under-Secretary of State of the Home Office, 16 June 1900; Under-Secretary of State of Home Office to Privy Council Office, 15 June 1900; K. Digby to Attorney General, 30 May 1900 [P.R.O. - P.C. 8/528].

²See p.20.

using English authorities in statutory interpretation, it is important to draw a distinction between the two. There exists a fundamental difference between the duties of the judge when developing customary law and when interpreting a statute. In the former, considerations of public policy, such as the need for certainty, can legitimately be of decisive importance. In the latter, the paramount duty of the court is to determine the intention of the legislature and then apply it to the facts of the case. The legal rule of *stare decisis* may require a judge to ignore his own view of the meaning of the statute, but the statement of good judicial practice contained in *Frankland and Moore*, discussed below, cannot do the same.

When considering the weight to give to English case-law when interpreting a statute, it is worthwhile distinguishing between three types of statute - statutes *proprio vigore*, *in pari materia*, and those Acts of Tynwald which expressly adopt Acts of Parliament.

Statutes *proprio vigore* are Acts of Parliament extending to the Isle of Man. In the absence of direct Judicial Committee authority, what follows must be somewhat speculative, but seems grounded in principle.

It has been suggested that, having regard to the general nature of such a statute, all the courts called upon to consider the statute may be considered part of a single system. That being the case, there would appear to be no basis for according special authority to English courts, and thus their interpretation of the statute need not be considered as binding ¹. Roberts-Wray adopts the first proposition but rejects the second in order to accord English decisions authoritative status:

“The function of a Court in interpreting a statute is to give effect to the intention of the legislature; Parliament must intend the words it uses to have the same meaning everywhere; and (passing to less substantial ground) the Act is primarily a United Kingdom statute, and , if in a case of conflict there is to be one source of authoritative interpretation, the source can only be the courts of the United Kingdom” ²

This view is subject to a number of criticisms. First, because Parliament intends to express itself with one set of words does not mean that Parliament intends those words to have the same effect in all jurisdictions covered by the statute. An Act abolishing all judicial posts would have the effect in England of abolishing High Court judges and stipendary magistrates, while in the Isle of Man the Deemsters and the High Baliff would cease to exist. Thus, the

¹ ALLOTT A.N., *Essays in African Law*, [London] (1960).

² ROBERTS-WRAY K., *Commonwealth and Colonial Law*, [London] (1966) 571.

intention of Parliament actually refers to the intended effect in *each* jurisdiction to which the Act extends - only part of the intention is likely to be considered in any one case, thereby reducing its significance to other jurisdictions. Second, the Act is not primarily a United Kingdom statute. Instead, within each legal system the Act has a separate existence, as can be seen in the principle that a repeal of an Act by the Imperial Parliament does not necessarily repeal it in the Manx jurisdiction ¹. Finally, even accepting that one authoritative interpretation is intended by Parliament, there exists no single United Kingdom court system able to provide it.

If statutes *proprio vigore* have no special rules governing their interpretation because of their source, it would seem probable that they are governed by the rules relating to statutes adopted by Tynwald, discussed below. In both cases, there is a strong contextual linkage between the Act in effect in the Manx jurisdiction, which the Manx courts are called upon to interpret, and the Act in effect in the English jurisdiction, which the English courts have already interpreted.

Turning to statutes *in pari materia*, that is, Acts of Tynwald modelled on Acts of Parliament, there is a considerable body of contradictory Judicial Committee authority on the value of English authorities. These cases can be divided into four categories - those which deny English decisions any authority beyond the merely persuasive; those which base the authority of the English decisions upon an appeal to judicial propriety; those which base the English decisions' authority upon the relationship between the Judicial Committee of the Privy Council and the Appellate Board of the House of Lords ; and those which base the authority of English decisions upon the will of the local legislature.

The Judicial Committee decisions which might reduce the value of English authorities to merely persuasive are weak on this point. The clearest *dicta* are of those of Lord MacMillan in *Commissioner of Stamps v Swan* ²

“Decisions of the Imperial Courts on statutes dealing with the same subject-matter may often be useful in the interpretation of similar provisions in colonial measures, and a comparison between similar measures of the Imperial and colonial legislatures may on occasion be helpful.”

¹ Corlett v Williamson (1920) Unreported.

² Commissioner of Stamps v Swan [1933] A.C. 378; see also Commissioner of Trade v Bell [1902] A.C. 563.

Much clearer, but less defensible, are those authorities which are based upon an appeal to judicial propriety. In *Trimble v Hill* ¹ it was said that “colonial courts should ... govern themselves by decisions of the English Court of Appeal”, yielding to its “high authority” so “that in all parts of the Empire where English law prevails the interpretation of that law by the courts should be as nearly as possible the same”. In *Cooray v R* ² it was stated that this “rule” extended to all Commonwealth courts, and invested lower courts with authority, but this case supported a discredited theory as to the authority of the English courts, and should not be given too much weight. More firmly, in *Chettiar v Mahatmee* ³ the “rule” was approved, but it was added that “in any particular case local conditions [may] make it inappropriate”. In *Kasumu v Egbe* ⁴ a further exception was added where the use of the authority would cause the statute to operate contrary to the policy of the local legislature, as expressed by the statute.

The propriety argument may be dismissed. There is no reason to afford the English courts any special status. Even if there were, a wish to accord with a foreign court does not derive its power from the presumed will of Tynwald, and therefore cannot displace the duty of the court to implement this intention when interpreting statutes.

The later statements of the Judicial Committee have concentrated upon the relationship between the Judicial Committee and the Appellate Board. In *de Lasala v de Lasala* ⁵ Lord Diplock referred to the similarity in personnel of the two bodies, and the likely effect on the development of basic law, and then continued:

“Since the House of Lords as such is not a constituted part of the judicial system of Hong Kong, it may be that in juristic theory it would be more correct to say that the authority of its decision on any question of law, even the interpretation of recent common legislation, can be persuasive only; but looked at realistically its decisions on such a question will have the same practical effect as if they were strictly binding, and the courts in Hong Kong would be well advised to treat them as being so.”

This view limits the practical authority of English decisions to the House of Lords alone. Lower courts would be well advised, however, to treat decisions of that body as strictly

¹ *Trimble v Hill* (1879) 5 App.Cas. 342.

² *Cooray v R* [1937] A.C. 407.

³ *Chettiar v Mahatmee* [1950] A.C. 481.

⁴ *Kasumu v Egbe* [1956] A.C. 539.

⁵ *de Lasala v de Lasala* [1980] A.C. 546; cited in *Frankland and Moore* [1987] A.C. 576.

binding. It is submitted that a desire to second-guess the Judicial Committee cannot serve to negate the duty of the court to implement the intention of Tynwald.

The final, and it is submitted correct, argument is based upon the supposed intent of Tynwald, and is exemplified by *Harding v Commissioner of Stamps for Queensland* ¹ in which Lord Hobhouse noted:

“Nearly thirty years after the later [English] decision the Queensland legislature passed their Succession Duty Act in terms identical with those of the English Act of 1853. It is impossible to suppose that they did not intend those terms to be read in the sense affixed to them by the English tribunals, and in which they would be read by every lawyer and every official conversant with the subject matter”.

The application of an accepted canon of construction to decisions made by the courts of a different jurisdiction was adopted by a later Judicial Committee decision ², and carries with it the implication that decisions by the English courts after the passing of the Act of Tynwald should not be accorded the same force ³. A decision of the Judicial Committee, while not expressly disproving these authorities, does firmly reject this doctrine:

“There is no presumption that the people of Ceylon know the law of England, and in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew or must be taken to have known decisions of the English Courts under the Money-lenders Acts, there is no basis for imputing to the legislature the intention to accept those decisions.” ⁴

While this may well have been relevant to the extensive territories of the Crown in 1950, the decision seems less applicable to the Isle of Man. Certainly, the Judicial Committee decision in *Ingram v Drinkwater* ⁵ accepted, possibly on the basis of the facts of the case, that Manx legislators are aware of English legislation. Manx legal professionals are certainly aware of the law of England, and the routine of legislation provides plentiful opportunity for input from the English legal system.

It appears, therefore, that the correct view is that a presumption exists that English cases interpreting similar statutes are to be followed by the Manx courts in interpreting the Manx

¹ *Harding v Commissioner of Stamps for Queensland* [1898] A.C. 769.

² *Cooray v R* [1937] A.C. 407. For further authorities, see Edge P.W., “The Value of English Authority in Interpreting Acts of Tynwald and Acts of Parliament extending to the Isle of Man”, (1994) 22 Manx L.B.106 at fn.19.

³ See *Deugau v Kramer* (1938) 4 D.L.R. 353.

⁴ *Chettiar v Mahatmee* [1950] A.C. 481.

⁵ *Ingram v Drinkwater* (1873) Pr.P. vol. 1875/8.

statutes. This presumption can be rebutted by, *inter alia*, special circumstances or the expressed will of Tynwald. English cases decided after the passage of the Act are merely persuasive, albeit very persuasive in the case of decisions of the House of Lords. This can be seen in *Wisbey v Oake* ¹, before the High Baliff's Court. The case concerned construction of the Firearms Act 1947, but the court placed considerable value on the English cases concerning a 1968 Act of Parliament:

“the appeal provision in the Manx Act is equivalent to that in the English Act, and accordingly these judgments are of great weight in the proceedings”.

Turning to statutes adopted by Tynwald, it is submitted that by expressly adopting the English Act, Tynwald also adopts the English cases upon that Act at the time - that is, it adopts the Act as glossed by the English courts. This class of decision differs from the previous two only in that the presumption is stronger, as Tynwald has, by its phraseology, recognised the identity between the Act of Parliament and the legal changes Tynwald wishes to effect in the Isle of Man.

Declarations of Customary Law.

After 1417 the executive occasionally required the Deemsters, aided by the Keys, to advise them of the content of Manx law ². Throughout this text these statements of legal doctrine are referred to as customary laws of the year that they were pronounced, and treated as authoritative statements of the customary law ³.

Finding Declarations of Customary Law.

The majority of these customary laws are recorded in the Manx statute books, although they are not true statutes.

Conclusions.

The patchwork of legislation in the Isle of Man has often been complicated. The practical complexities of finding legislation in two different sources has not been reduced by the informal division of legal authority and constitutional responsibility between the two most important legislatures. The increasing autonomy of Tynwald in an increasing range of areas

¹ *Wisbey v Oake* (1990-2) Manx L.R. 43.

² See p.69.

³ An important nineteenth century writer took the same view, but added the proviso that this status was not to be accorded where the declared law had been "rendered obsolete by time and change of circumstances" - see BLUETT J.C., The Advocate's Notebook, [Douglas] (1847), Introduction.

might be expected to simplify finding legislation applicable to the jurisdiction. Similarly, the clear statements in *Re C.B. Radio* appear to have resolved the legal relationship between the two legislatures, whatever the doctrinal difficulties in that decision.

Chapter Four: Sources of Law - Case-law.

This chapter discusses the legal and practical value of precedents from Manx courts, the Judicial Committee of the Privy Council, English courts, and elsewhere. On the whole, the discussion is focussed on how Manx courts develop Manx customary law, or policy, rather than interpretation of statutes, which is discussed elsewhere.

Manx Precedents.

Today, the judicial process is fairly clear-cut, and the reporting and hierarchy necessary for binding precedent are firmly established ¹. In earlier periods, however, there existed two quite different methods of judicial law-making.

The first method was the application, distinction and development of prior written precedents by the judiciary. An early writer referred to this method of judicial law-making as “chest law” ², on the grounds that the written precedents were kept in a large wooden chest. There is no evidence that this term was adopted in the Isle of Man, and, as it may be confused with the similarly named breast law ³, this paper uses the term precedential law. This method grew in importance, as legal doctrines were increasingly reduced to writing, and is the method generally thought of as judicial law-making today.

The second method is harder to describe. Before 1422 the laws of the Isle of Man were passed down from Deemster to Deemster orally ⁴, and were said to reside in the Deemster's breast. The Deemsters were not the sole authority on the Manx customary law. A number of the early Acts, generally referred to as declarations of customary law, were simply statements by Tynwald of the customary law ⁵. Additionally, by customary law the executive could call upon the Deemsters and the Keys, together, to state the customary law on a particular point, and this method of discerning breast law continued into the nineteenth century ⁶. These other forms, while not legislation *per se*, were not part of the judicial process, but rather

¹ For the Manx courts, see p.143.

²BLUNDELL W., “A History of the Isle of Man”, (1656) Manx Society 27,1.

³Although different derived - chest refers to a wooden casket, while breast refers to the thorax.

⁴Deemsters were often members of the same family, and took office at an early age. Ewan Christian (1579-1656) was Deemster for 51 years, from the age of 26. For the last six years his son John acted as his Deputy. See MOORE A.W., Manx Worthies, [Douglas] (1901) 59-82.

⁵eg. Customary Laws 1577.

⁶MOORE A.W., Extracts from the Journals of the Self-Elected House of Keys, [M.M.A.] (1905); Lieutenant-Governor Smelt to Lord Sidmouth, 19 December 1816 [Letterbooks 2,197]; [1831] Manx Sun 26 July.

authoritative statements of customary law ¹. A declaration of the breast law, during a case, was simply a reduction of oral tradition to written precedent ². Accordingly, one would expect breast law, in time, to be supplanted by precedential law. This view, however, neglects a more potent form of judicial creativity. The Deemsters enjoyed, in practice, unfettered discretion to declare the law, especially in novel cases, according “to the mere conscience of a judge” ³, and have it “held for law” ⁴. Where the customary laws were irrelevant, and no precedent existed, judicial creativity might fill the gap.

To the modern reader, this distinction may appear to be one without difference. Precedential law was simply the development of breast law which had been declared in a previous case. In both instances the judges were making law to some extent. Important individuals responsible for law making and enforcement, however, viewed this distinction as valid. On a number of occasions, as discussed below, action was taken against breast law, which was viewed as having special flaws, as opposed to the precedential law. It is submitted, therefore, that the validity of this distinction to the law-makers of the seventeenth and eighteenth centuries must be accepted if their actions are to be properly understood.

In 1636 the Lord of the Isle of Man ⁵ directed the Deemsters to detail the breast law. The Lord disapproved of the Deemsters being privy to law unknown to himself or his Council; of the people of the Island being subject to laws of which they could not be aware; and of such unwritten laws being incompatible either with one another or the more conventional Manx laws ⁶. It would appear that this was an early attempt to eliminate breast law by reducing it entirely to written precedent. It appears to have had no effect, since the Lord issued a similar order, in 1667 ⁷, which was itself ignored ⁸, except for the compilation by Deemster Parr of “an abridgement of the established and practical laws” .

¹BLUETT J.C., An Advocates Notebook, [Douglas] (1847) took the same view, adding the proviso that such declared laws could be “rendered obsolete by time and change of circumstances”.

²The oral tradition was strong in the Norse and Celtic Kingdoms, and before this period the Isle of Man had been closely tied to both systems, see p.105.

³ADAMSON L., “Letter to Sir Robert Peel on the Present Code of Manx Law”, [M.M.A.] (1841).

⁴CAMDEN, Brittanica, (1695) Manx Soc. 18, 16.

⁵At that time the ruler within the Manx legal system, although as has been noted above, he owed allegiance to the English Crown. See p.111.

⁶Ordinance of 1636 s.5 [An Ordinance of the Lord of Man].

⁷Appended, for no obvious reason, to the Servants Act 1667.

⁸See MYLREA D., The Ancient Customary Law of the Isle of Man, [M.M.A.] (c.1660).

Even if these orders had succeeded in reducing the first form of breast law to writing, problems caused by judicial creativity would remain unless new declarations of law were prohibited. As well as the problems of judicial creativity common to most jurisdictions, two special problems existed in the Manx context.

First, no more than two Deemsters existed at any one time, so that the power inherent in judicial creativity was focused, rather than diffuse. While this power may have been diluted when the Keys were called to assist the Deemsters, it is probable that the Deemsters were able to dominate even the Keys by virtue of their office ¹. It is generally accepted that focused judicial power is a problem in a case-law based legal system, and it has been suggested that it is an important justification of *stare decisis* ².

Second, there is evidence that the Deemsters possessed a local power base potentially antagonistic to the Lord. Although appointed by the Lord, as late as 1784 it was inconceivable that a Deemster should be other than a Manxman ³. This was necessary as a foreigner would neither be fluent in the Manx tongue ⁴, nor familiar with the breast law ⁵. As early as 1648 it was recognised that the demise of breast law could allow the appointment of an English Deemster ⁶, and this has proved to be the case ⁷. Accordingly, if the Manx Deemster were seen as politically dangerous, abolition of breast law could both reduce his power, and pave the way for an English incumbent. That the Deemster could be the focus of

¹Concerning the Keys role in breast law, it is worth noting that the executive were, by customary law, entitled to refer questions on points of law to the Deemsters and the Keys. The Keys fulfilled this role both before and after Revestment. By the start of the nineteenth century communications between executive and the Keys had evolved into a formal request as to political ends and means rather than the more traditional declaration of legal doctrine, but these questions still arose - see Lieutenant-Governor Smelt to Lord Sidmouth, 19 December 1816 [Letterbooks 2,197]; [1831] Manx Sun 26 July.

²MALTZ E., "The Nature of Precedent", (1988-89) 66 N.C.L. Rev. 367.

³See "Letter from the Attorney General", [M.M.A.] (1784). The special status of the Deemster was, even at that time, very ancient - see BLUNDELL W., op.cit., 67.

⁴CAMDEN, op.cit., 1.

⁵BLUNDELL W, op.cit., 1; Commissioners Report, (1792) appendix containing the Attorney General's deposition.

⁶CAMDEN, op.cit., 1.

⁷CALLOW, "The Deemster", (1925) Great Thoughts [M.M.A.]; see p..

Manx dissent can be seen in a number of trials for sedition and treason ¹. While the Lord had the power to remove the Deemster at any time, use of this power could create difficulties in the context of a traditional breast law.

In some areas, breast law was effectively excluded by legislative action. With the increased number of written precedents in the Manx jurisdiction, and the increasing use made of English precedents where Manx are not available, the authority of the Manx judiciary to declare unwritten laws with no basis in precedent must be doubted.

Rules of Precedent.

It is worth concluding this discussion with a *caveat*. Rules of precedent based upon English models are, to some extent, predicated upon a volume of case-law similar to that in the English jurisdiction. In the Isle of Man, where the number of cases is likely to be very small, the importance of an individual case is likely to be proportionately greater. Certainly, in the author's own research, even decisions of figures equivalent to English stipendiary magistrates have been both useful and important. Thus, while decisions of the higher Manx courts are undoubtedly of great importance, and capable of binding lower courts, the importance of *any* documented decision of a Manx court should be emphasised. Similarly, technical distinctions between *obiter dicta* and *ratio decidendi* may not always be so important in the Manx jurisdiction.

Reporting.

The records of case-law were not always easily available ². Following an order in 1422, records of cases were kept ³, but it was initially decided to record these proceedings on loose rolls of parchment. These *Libri Rotulorum* were stored in a wooden chest ⁴, and few of them survived to enter the Manx Museum archives. By 1580 the loose rolls had been replaced by

¹See the cases of Edward Christian (1643) L.P.; Christian (1662) L.P.. See also, HARRISON W., "Illiam Dhone and the Manx Rebellion, 1651", (1877) Manx Soc. 31, 1.

²See further Manx Courts and Court Documents in the General Registry, [M.M.A.] (1967); TWINING W. & UGLOW J., Legal Literature in the Isle of Man, [M.M.A.] (1978).

³See Customary Laws 1422 s.32-33.

⁴See p.69.

bound volumes which have survived. Discussion concentrates on the three most important series of volumes, together with their successors ¹.

Libri Placitorum which ran between 1496 and 1901, recorded the proceedings of the Sheading Courts ² and their successors ³. Additionally, before 1848 the proceedings of the Court of General Gaol Delivery ⁴ were also recorded here. Between 1848 and 1900 the proceedings of that Court were entered into a separate series of *Criminal Books*. From the start of this century the proceedings of the Common Law Division were kept in the *Common Law Action Files*, while those of the Court of General Gaol Delivery were entered in the *Criminal Files*. Additionally, after 1921 a series of *Criminal Appeal Files* was kept, and after 1926 a series of *Adoption and Summary Jurisdiction Files*.

Libri Cancellarii, which ran between 1578 and 1890, recorded the proceedings of the Court of Chancery, later the Chancery Division of the High Court. After 1891 the proceedings of that court were to be found in the *Chancery Actions Files* ⁵.

Libri Scaccarii, which ran between 1580 and 1847, recorded proceedings of the Court of Exchequer ⁶. Between 1849 and 1895 these could be found in the *Exchequer and Staff of Government Books*, which later became the *Staff of Government and Tynwald Court Files* ⁷.

The older records are available for examination in the Manx Museum ⁸. The majority of these are also available on microfilm, courtesy of the Church of the Latter Day Saints, and the Museum prefers readers to use these where possible, in order to preserve the frail originals ⁹. The later files, including those relating to this century, are retained at the General

¹Also of some interest are *Libri Juramentorum* (the Books of Oaths), *Libri Irroluramentorum* (the Books of Commissions), and Enquest and Petition Files.

²See p.190.

³Details of appeals from the Court of General Gaol Delivery to the Privy Council are also available in this series.

⁴See p.188.

⁵See also Chancery Files (1710-1847); Chancery Petitions (1806-date).

⁶See pp.189, 193.

⁷See also Exchequer Files (1793-1840).

⁸Contact, The Archivist, Manx Museum and National Trust, Douglas, Isle of Man.

⁹It is unusual that the Church of the Latter Day Saints, a religious organisation of global scope, performed this service. The members of the Church believe that religious devotions can affect the fate of the dead. In order accurately to perform these devotions, local records are microfilmed and transferred to the headquarters of the Church in the United States of America. The Manx Museum, as holders of the records in question, gave

Registry ¹. The General Registry is not oriented towards research to the same extent as the Manx Museum and, due to limitations of staffing, space and secrecy, are unable to allow general access to their records. Where a particular record is requested, however, the General Registry is willing to make it available.

A number of collections of precedents have been made by individuals, of which the best is probably that of John Quayle, a Clerk of the Rolls ² who compiled a digest of the precedents recorded between 1417 and 1711. This digest is only available in manuscript, at the Manx Museum, which is particularly unfortunate as a number of early precedents from *Libri Rotulorum* have been lost since the compilation. Other manuscript collections are also available at the Manx Museum ³. Additionally, after 1847 members of the Manx Bar and judicial officers occasionally published digests of cases decided while they were present in court ⁴. It was not until 1985 that the first volume of the *Manx Law Reports* was published. The compilation of that volume required collection of all written reasons for judgment in Manx Courts after 1883. It is the intention of the publishers to publish volumes reaching back to that time, but until then the reasons for judgement are available at the Library of the Attorney General, and the Library of the Manx Law Society, where the Librarian has compiled an index of these judgments. The greatest problem with these precedents is the absence of an index. Individual collections are occasionally indexed, as are volumes of the *Manx Law Reports*, but no more complete index exists.

A publication of increasing practical value is the *Manx Law Bulletin*. First published in 1980, after 1989 it became an increasingly comprehensive digest of recent judicial and legislative developments, as well as an outlet for original work on Manx law. It has acquired sufficient status as a journal to be entered in the *Legal Journals Index*.

Precedents From The Judicial Committee of the Privy Council.

permission to the Church to film the records, on condition that the Manx Museum be furnished with a copy. My thanks to the Manx Museum Library staff for this background detail.

¹Contact: The Registrar, The General Registry, Douglas, Isle of Man.

²It should be noted that the Clerk of the Rolls was the official keeper of the Manx legal records digested in his collection.

³See THORNLEY J., A Book of Precedents, [Douglas] (1987) pp.8-11. Newspaper reports of varying detail and frequency can be found in insular publications after 1804 - see (1804) Manks Advertiser 18 February.

⁴See for instance BLUETT J.C., The Advocates Notebook, [Douglas] (1847); EASON R.K., Reflections on the Judicial Process in the Isle of Man, [Douglas] (1988); FARRANT R.D., Digest of Manx Cases Heard and Decided during the period 1925-1947, [Douglas] (1947).

The Crown has an appellate jurisdiction in the Isle of Man. This jurisdiction is derived from the authority of the British Crown as suzerain, rather than as Lord of the Isle of Man, as demonstrated by exercise of this jurisdiction before Revestment ¹. The jurisdiction came to be exercised by the Privy Council, and, in particular, the Judicial Committee of the Privy Council ².

While the Judicial Committee is formally under a duty to report on the case to the Crown ³, in practice it acts as an appellate court ⁴. As the final appellate court the Judicial Committee produces judicial decisions which can, under the doctrine of *stare decisis*, bind the Insular Courts ⁵, and thus determine the content of Manx law. It is clear that the lesser Manx courts ⁶ are bound by a decision of the Judicial Committee on an appeal from a Manx court ⁷.

A question of some interest is the extent to which decisions of the Judicial Committee on appeal from other jurisdictions bind the Manx courts. If decisions of the Judicial Committee on the numerically more significant appeals from non-Manx jurisdictions are binding upon Manx courts, the importance of this body in Manx law-making would be increased.

In *Frankland* ⁸ Sir Iain Glidewell J.A. in the Staff of Government looked to a Judicial Committee decision, on appeal from Hong Kong, for guidance on the value of English murder cases. Initially, the Judge of Appeal referred to the decision as “binding” but continued:

“... strictly, that is not correct, because this is an appeal from Hong Kong not from the Isle of Man. It could only be when it was an appeal from the Isle of Man that it strictly could be binding upon us.”

¹An especially good example, where the appeal resulted in punishment of several of the Lord's principal officers, is the case of *Illiam Dhone*, noted at p. 41.

²Unless anachronistic, the term Judicial Committee is used to describe this body.

³Judicial Committee Act 1833 s.3; *Attorney General for Ontario v Attorney General for Canada* [1947] A.C. 127.

⁴*British Coal Corpn. v R* [1935] A.C. 500; *Ibralebbe v R* [1964] A.C. 900; *Hull v M'Kenna* [1926] I.R. 402.

⁵In a formal sense, the Judicial Committee, when hearing an appeal from a Manx court, was itself a Manx court. This view neglects the staffing of the Judicial Committee, and the position of the Committee as an Imperial rather than a national body.

⁶*Read v Bishop of Lincoln* [1892] A.C. 644; *Attorney General for Ontario v Canada Temperance Federation* [1946] A.C. 193; *Nkambule v R* [1950] A.C. 379; *Cushing v Dupuy* [1886] 5 App.Cas. 409; *Mercantile Bank of India v Central Bank of India* [1938] A.C. 287.

⁷cf. *Williams* (1970) 16 W.I.R. 63, a heterodox West Indian case, which is almost certainly not an accurate statement of the law in the Isle of Man.

⁸*Frankland v R* [1978-80] Manx L.R. 275.

Although *Frankland* reached the Judicial Committee, this point was not considered. Accordingly, the highest Manx authority that can be brought to bear on this question is unreasoned *obiter dicta* from a Staff of Government decision. Later Manx cases indicate that this matter remains unresolved, with *dicta* supporting both views on the point ¹. There is some guidance, however, from the decisions of the Judicial Committee.

Technically, these decisions are incapable of providing binding proof on the point. A decision of the Judicial Committee, on appeal from another jurisdiction, which stated that all decisions of the Judicial Committee were binding upon the Isle of Man would be *obiter dicta*, and, even more technically, could not bind the Manx courts if they decided it was incorrect. Realistically, however, the Judicial Committee is unlikely to depart from a line of decisions on the point, and thus Judicial Committee decisions on appeal from other jurisdictions are of the highest value in dealing with this question. It is regrettable, therefore, that the Judicial Committee jurisprudence is both inconclusive and mixed ².

The only case from this jurisprudence which must be discussed is *Bakhshuwen v Bakhshuwen* ³, which turned on a point of Islamic law. Lord Simonds delivered the opinion of the Committee:

“Their Lordships ... cannot accept the theory which appears to underlie [a cited authority] that the interpretation of [Islamic] law given by this Board in a series of cases is confined to that law as applied or administered in India. On the contrary, it has not been suggested that ... [Islamic] law is not the same in East Africa as in India. The appellants have themselves relied on its universality ... the experienced judges of the Court of Appeal for Eastern Africa did not doubt that on a question of [Islamic] law decisions of the Judicial Committee in appeals from India must bind them in appeals from the High Court of Zanzibar. Their Lordships are of opinion that this was clearly the correct view, and that it must prevail also in appeals from Kenya”

The above passage appears to have formed part of the *ratio decidendi* of the case, in all but the most technical of senses ⁴. It is worth noting, however, that the language was very guarded. The Judicial Committee repeatedly emphasised that the decision was on Islamic

¹ Gray and Ors (1990) 14 Manx L.B. 275; *Aguilar v Anglian Windows* (1989) 12 Manx L.B. 75.

² For a fuller review of the Judicial Committee cases, see EDGE P.W., “Decisions of the Judicial Committee of the Privy Council in Other Jurisdictions: Limits of *Stare Decisis* in Commonwealth Jurisdictions”, (1994) Commonwealth Law Bulletin 720.

³ *Bakhshuwen v Bakhshuwen* [1952] A.C. 1 (on appeal from the Eastern African Court of Appeal).

⁴ See ROBERTS-WRAY K., Commonwealth and Colonial Law, [London, 1966] 572-5.

law, which was of universal application. The case is too specific to ground a general principle, but any general principle formulated must be able to account for the decision ¹.

Moving on to general principle, it seems probable that the reason Manx courts are bound by the Judicial Committee is because the Judicial Committee is superior, in the appellate hierarchy, to the Manx Courts; rather than because the Judicial Committee is taken to enunciate the relevant legal principle with more authority ². Adoption of the hierarchical principle does not resolve the problem, however, as it can be taken to include or exclude decisions from other authorities from those binding upon Manx courts.

While the Judicial Committee of the Privy Council is “an imperial court which represents the Empire, and not any particular part of it” ³, some authority exists for the proposition that the Judicial Committee should be regarded as a multiple jurisdiction body. In *de Lasala v de Lasala*, for instance, Lord Diplock spoke of “Hong Kong courts, of which this Board itself is one when it is hearing a Hong Kong appeal” ⁴. The argument that the Judicial Committee is a multiple jurisdiction body, which has no relationship to one legal system when fulfilling its role in another, received its fullest consideration in *Pesona v Babonchi Baas* ⁵. After explaining that the Judicial Committee was a separate entity in each jurisdiction, Basnayake J. continued:

“to say that decisions when advising his Majesty in the exercise of his prerogative have the like force and effect automatically in all parts of the Commonwealth is to ignore the very basis on which appeals to His Majesty in Council rest and the law relating to the constitution and *cursus curiae* of the Supreme Court of each Dominion.”

While this theory is a strong one, it conflicts with a very strong line of Australian cases, as well as one Judicial Committee decision. The High Court of Australia at one time recognised that:

¹ See BURGESS A.D., “Judicial Precedent in the West Indies”, (1978) 7 Anglo-American Law Review 113.

² A paraphrase of DAVIS A.G., “Judicial Precedent in New Zealand”, (1954-5) 30 New Zealand Law Journal 305 at 351, 31 New Zealand Law Review 425. See to justify this assertion *Viro v R* [1978] 18 ALR 257 (High Court of Australia); *Bruce v Waldron* [1963] VR 3 (Supreme Court of Victoria); *Frankland* [1987] AC 576 (more relevant, but less clear, than the Commonwealth authorities).

³ *Hull v McKenna* [1926] IR 402 (Privy Council on Appeal from the Irish Free State).

⁴ See *de Lasala v de Lasala* [1980] A.C. 546 (Privy Council on appeal from Hong Kong).

⁵ *Pesona v Babonchi Baas* (1948) 49 NLR (Ceylon) 442 (Supreme Court of Ceylon).

“in ordinary cases this Court is bound by the decisions of the Judicial Committee, for the very obvious reason that, if it declined to follow them, the decision of this Court would be reversed on appeal, so that such a refusal would be both futile and mischievous. Apart from this reason it is a recognised working rule that Courts whose decisions are subject to appeal should follow the decisions of the Court of final appeal ...”¹

The High Court has applied this principle even to decisions of the Judicial Committee on appeal from other countries². This acceptance of the hierarchical argument, and of the binding power of all Judicial Committee decisions reached its zenith in *Viro v R*³. In that case, the High Court found that, since appeals did not lie to the Judicial Committee from its decisions, Judicial Committee decisions were no longer binding upon the High Court. Of the seven judges, the three who considered the matter agreed that the source of the appeal had never affected the force of the precedent⁴.

This line of cases is important for emphasising the pragmatic hierarchical position stressed in the *dictum* above. If the hierarchy principle exists because the superior court is capable of over-riding the inferior, it does not appear relevant that the superior court over-ruled the inferior in favour of a decision made in another jurisdiction. Neither is such a stance compatible with *Bakhshuwn v Bakhshuwn*, or the *dicta* in that case. However narrow the rule which this case states, a theory which conflicts with it cannot be upheld. If precedent is a function of hierarchy, and the Judicial Committee is not simultaneously the head of all hierarchies, then the decisions referred to could not, *de jure*, have bound the lower courts, no matter how unique the subject matter.

Accordingly, it is submitted that all decisions of the Judicial Committee are potentially binding upon the Manx courts. The special nature of Manx law does not affect the general rule. Nonetheless, this finding is not so dramatic as may initially appear. In *Mayer v Coe*⁵, a decision of the Supreme Court of New South Wales, Street J. said:

“... a decision of the Judicial Committee laying down principles or lines of reasoning directly applicable within the jurisdiction in question will bind the courts of that

¹ *Baxter v Commissioner of Taxation* (1970) 4 CLR 1087 (High Court of Australia on appeal from New South Wales).

² *Morris v ES&A Bank* (1950) 97 CLR 624 (High Court of Australia).

³ *Viro v R* (1978) 18 ALR 257 (High Court of Australia).

⁴ See ALLSOP J. & GREGG M., “Privy Council Decisions in Australia: The Law of Excessive Force in Self-Defence”, (1977-9) 8 Sydney Law Review 731.

⁵ *Mayer v Coe* [1968] 2 N.S.W.R. 747 (Supreme Court of New South Wales).

jurisdiction even though the proceedings [in question] originated in another part of the British Commonwealth.”

In other words, a decision of the Judicial Committee can only have binding force when the legal background of the two jurisdictions is identical in the area in question. A decision on Romano-Dutch law is binding upon all courts when they considered that point of Romano-Dutch law, but not when they determine the common law applicable to an identical factual situation ¹. Similarly, a decision of the Judicial Committee on an appeal from some other jurisdiction is only binding upon the Manx courts when the legal background in the two jurisdictions is sufficiently similar to make the decision applicable.

The final point to consider is when the legal background between the Isle of Man and a generic common law commonwealth jurisdiction is close enough to render a decision from the latter jurisdiction binding in the Isle of Man. This would depend very much upon the exact facts of the case, but a number of situations would appear to increase the probability of such application. First, where the Manx courts have adopted English common law rules, under the principle expounded in *Frankland* ². Second, where the decision concerns interpretation of an Act of Parliament extending to both jurisdictions. Third, where the decision concerns general Imperial principles of constitutional law involving, for instance, the succession of the Crown.

It is important to end this technical discussion on a more practical note. The discussion above has drawn out the uncertainty which prevailed over this point but, insofar as the authorities allow for a generalisation, decisions of the Privy Council are given very wide authority, regardless of source. It would be unwise, therefore, to evaluate the importance of decisions of the Privy Council purely upon the basis of *de jure* binding discussed above.

English Precedents.

It has been suggested in a previous section that English precedents may have a special value where the Manx court is required to interpret a statute. In this section, discussion will centre primarily on the value of English precedents in determination of Manx customary law.

The Legal Value of English Precedents in the Manx Courts.

The first issue to discuss is whether English cases are, *de jure*, capable of binding the Manx courts. Before this century the practice of the Manx courts was to give very strong persuasive value to decisions of the English courts. It was always possible that such a practice could harden into a legal rule. Writing in 1847, J.C. Bluett, a Manx advocate who compiled a

¹ Consider *Nkambule v R* [1956] A.C. 379 (on appeal from Swaziland).

²See p.79.

collection of Manx precedents which is cited in the Manx courts today, made an attempt to counter this tendency:

“in our oral pleadings in the various insular tribunals, in all new cases we look for guidance to the decisions of the English courts; not because we hold them binding upon us, but from a due regard for the great wisdom and experience of the English judges. Should such decisions, however, be in any way repugnant or inimical to our insular position or circumstances, our local interests or requirements, it would be equally competent to look for direction to the *Panclepts of Justinian* - the *Code Napoleon* - or the more proximate and (to us) clearer light of the law of Scotland. I trust the reader will pardon me for thus stating what I consider to be the only true ground upon which an English authority should be quoted in a Manx court” ¹.

This century, however, has seen an attempt by the courts to lay down, in relation to the use of English authorities, either a suggestion as to good practice, or a legal rule actually making such authorities binding upon the Manx courts. In this section we will consider whether such a legal rule exists.

In 1980 the Staff of Government discussed the proper use of English precedents when determining Manx customary law ². The Judicial Committee considered the case in the consolidated appeal of *Frankland and Moore* ³. It is necessary to consider *Frankland and Moore* in some detail in order to show that it is an authority primarily on customary law rather than the interpretation of statutes, as different juristic issues are raised by the two situations.

The Criminal Code 1872 s.18 provides that “Whosoever shall unlawfully and feloniously kill another, with malice aforethought, shall be guilty of murder”. In *Frankland and Moore* the appellants argued that the lower courts had misinterpreted malice aforethought so as to include objective intent ⁴. The Judicial Committee concurred. Thus, the case seems concerned with statutory interpretation. Closer consideration of the *dicta* reveals otherwise.

Lord Ackner explained:

“In the Isle of Man, murder is a statutory offence ... It is common ground that this definition has been given the same meaning in Manx law as the common law offence of murder in English law ... The question at issue is whether the test was part of the common law of England, and therefore part of Manx law ... Decisions of the English courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx courts, but they are of high persuasive authority ... Such decisions should generally be followed unless either there is some provision to the contrary in a Manx statute or there is some decision of a Manx court to the contrary, or, exceptionally, there is

¹BLUETT J.C., *The Advocate's Notebook*, [Douglas] (1847) 5.

²Frankland (1980) Staff of Government, Unreported [Law Society Library].

³Frankland and Moore [1987] A.C. 576.

⁴See SMITH J.C. & HOGAN B., *Criminal Law*, [London] (1992) 86-91.

some local condition which would give good reason for not following the particular English decision.”¹.

The Committee then examined the English authorities, determining that the objective test was not part of the English common law, and thus allowed the appeal. As a matter of pure statutory construction the argument that, since the objective test was not part of English common law, the Manx statute did not allow the test does not withstand consideration. A stage in the reasoning, providing the key to the case, is left implicit.

Generally, reference is not to be had to customary law when interpreting a codifying statute². This rule does not apply so strictly where the code, as in this case, is not a complete statement of the law³. Further, “it is permissible to look at the state of the previous law in cases of ambiguity or where words have acquired a technical meaning”⁴. Since malice aforethought is a technical term⁵, the Committee determined its meaning by recourse to Manx customary law, which in turn was determined by reference to English common law. Thus, *Frankland and Moore* turned on the use of English decisions to determine Manx customary law.

It is clear that both the Staff of Government, and the Judicial Committee, viewed decisions of the English courts, in Lord Ackner's words, not as “binding on the Manx courts”, but of “high persuasive authority”, so that “they should generally be followed”. If the statement of principle in *Frankland and Moore* is a rule of law, there must be a reconciliation of the polarity between a decision not being binding, yet being one that should generally be followed.

Decisions of English courts cannot bind the Manx courts through *stare decisis*, because *stare decisis* in the Isle of Man depends upon the position of courts within the same hierarchy. The English courts are not part of the Manx hierarchy and, apart from the House of Lords, do not even share membership with Manx courts. This does not exclude the possibility that the Judicial Committee could require the Manx courts, “generally to follow” decisions not binding by *stare decisis*. Three legal principles could support such a requirement.

First, that the relationship between the Manx and English legal systems gives English decisions force. Under the common law, settlers in uninhabited territories took with them the

¹*ibid*, at 585-593. Lord Ackner substantially repeated the comments of Glidewell J.A. in the Staff of Government.

²*Bank of England v Vagliano* [1891] A.C. 107 (House of Lords).

³DWORKIN G., *Odger's Construction of Deeds and Statutes*, [London] (1967) 335.

⁴*ibid*.

⁵Meaning neither malice nor aforethought, but rather the mental element in murder.

common law subject to such qualifications as local circumstances rendered necessary ¹, while many territories acquired by conquest or cession later had their basic law replaced with a grant of the common law. Thus, the English legal system was the ancestor of many territories legal systems, and English decisions were thereby endowed with special potency ². The native legal system of the Isle of Man was not replaced with an offspring of the English law, no matter how far it may have come to resemble it, and therefore English decisions can have no ancestral authority.

Second, that the constitutional relationship between the Isle of Man and England gives English decisions force. This argument receives its strongest support from those Commonwealth legal systems which have rejected the authority of English decisions. In *Persuad v Plantation Versailles* ³, before the Supreme Court of Guyana, Bollers J. stated that:

“as this country (Guyana) has now achieved the status of complete independence, we judges will no longer consider ourselves hidebound by English decisions but with mature judgement in suitable cases will strike out and mould the common law”.

The obverse of this argument would be that, since the Isle of Man is a dependency of the British Crown, the Manx courts should defer to the English. Such a deference is not to be found in the relationships between the legislatures, and even in territories where the local legislature is subordinate to Parliament, “colonial courts are not, and never have been, subordinate to English courts” ⁴. Even if the possession of the Isle of Man by the British Crown does establish some form of ascendancy, it is difficult to locate the court structure which would benefit therefrom - Great Britain includes Scotland, and there seems no reason to prefer the English court structure to the Scots when awarding this special status. Thus, it is

¹ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 523-585. This followed easily from the forms in which settlements were first authorised by the Crown - see BERRIEDALE K., Constitutional History of the First British Empire, [Oxford] (1930) 3.

²eg. *Robins v National Bank Co.* [1927] A.C. 515 (Privy Council on appeal from Ontario); *Trimble v Hill* (1879) 5 App.Cas. 342 (Privy Council on appeal from New South Wales); *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1895] 3 W.L.R. 317 (Privy Council on appeal from Hong Kong); *Corbett v SoS Commission* [1962] N.Z.L.R. 878 (New Zealand Supreme Court). Consider ROBERTS-WRAY K., op.cit., (1966) 545-572; ELIAS T.O., "Colonial Courts and the Doctrine of Judicial Precedent", (1956) 18 M.L.R. 356. cf. *MLC Assurance v Evatt* (1968-9) 42 A.L.J.R. 316 (High Court of Australia); *M'Kenna v M'Kenna* [1985] V.R. 665 (Supreme Court of Victoria); JACKSON D., "Judicial Commonwealth", (1970) 28 C.L.J. 257; BURGESS A.D., "Judicial Precedent in the West Indies", (1978) 7 Anglo.Am.L.R. 113; BENTICK J.K., "Authority of English Appellate Courts Jurisprudence Before Australian Supreme Courts", (1975-7) 5 U.Tasmania.L.R. 299; PARSONS R., "English Precedent in Australian Courts", (1948-50) 1 U.W.A.A.L.R. 211.

³*Persuad v Plantation Versailles* (1970) 17 W.I.R. 107 (Supreme Court of Guyana).

⁴ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 570, see also 563-4.

improbable that English decisions gain binding force from the relationship between the Isle of Man and England.

The third basis is that the Judicial Committee created a new legal rule, for reasons of utility, requiring Manx courts to afford English decisions force. An obvious problem with this view is the theory that judges do not make law but merely declare law which always existed in the abstract. If that were the case, the Judicial Committee cannot have replaced the complete, if undeclared, corpus of Manx customary law with the English common law. It would seem, however, that the better view is that, within limits, judges do make law ¹. Thus, the Judicial Committee can lay down a method of determining the content of Manx basic law which requires acknowledgement of the law-making judicial function. Since a number of accepted rules exist for determining the content of law, notably *stare decisis* and canons of statutory construction, it does not seem possible to argue that the Judicial Committee are unable to create this further rule ². This principle, therefore, may be valid, and if *Frankland and Moore* lays down a rule of law, it is the principle upon which the rule must be based.

It would seem reasonable to expect such an important piece of judicial law-making, based on utility, to be clearly stated and justified by the Judicial Committee. The dicta in *Frankland and Moore* are, at best, ambiguous. The Manx courts have not categorically indicated that they are bound by any rule laid down in *Frankland and Moore*, although all comments on the case reiterate the principle as one which is to be followed. Nor have the courts applied the legalistic approach to those exceptional circumstances justifying departure which would be expected if a rule was legally binding upon them ³. Finally, the small Manx Bar does not attach coercive force to the decisions of the English courts. In a postal survey of the sixty-six strong Manx bar carried out by this writer in 1993, none of the thirty-three advocates who replied gave more than persuasive force to English precedents when determining Manx customary law, and none indicated that *Frankland and Moore* had established the legal rule governing the value of such precedents.

It appears, therefore, that the principle laid down in *Frankland and Moore* is an indication of good judicial practice, rather than a statement of a binding rule of law. The distinction may be very fine, depending upon the perceived willingness of the Judicial Committee to insist upon

¹HAMPSTEAD L. & FREEMAN M.D.A, Lloyd's Introduction to Jurisprudence, [London] (1985) chapter 12.

²For a fuller consideration of judicial law-making, see inter alia, PATERSON A., The Law Lords, [London] (1982); GOLDSTEIN L., "Four Alleged Paradoxes in Legal Reasoning", (1979) 38 C.L.J. 373; HAHLO H.R., "Here Lies the Common Law: Rest in Peace", (1967) 30 M.L.R. 241,607.

³See Gray (1990-2) Manx L.R. 74 per Field-Fisher J.A.; Re Barr and Ors. (1992) 19 Manx L.B. 48 per Hytner J.A.; Ecclesiastical Insurance v Boyd (1991) 16 Manx L.B. 39.

this good practice. While a Manx court is not, as a matter of law, required to justify departure from an English authority by reference to the exceptions discussed in *Frankland and Moore*, it may be prudent for the court to do so, especially for decisions of the House of Lords, lest the decision be reversed upon appeal and the English authority favoured ¹.

The Real Value of English cases in the Manx courts.

Proper judicial consideration of the value of English authorities began in the nineteenth century with *Bold v Roper*, decided in 1822 ². Roper was involved in a heated dispute with Lieutenant Colonel Bold, and caused a poster to be placed to the effect that:

“The man who, unprovoked, wantonly insults another and refuses to explain or give satisfaction cannot be a Gentleman. Mr. Bold, the avowed editor of the Rising Sun, has done so by me and I therefore consider him a coward.”

Bold brought a petition charging Roper with having wilfully and maliciously made a publication tending to a breach of the peace. The substantive issues in the case are less interesting than the interplay between Roper and Deemster Heywood ³. Roper, an Irish Barrister with twenty eight years experience, repeatedly placed reliance upon English authorities, case-law and practice. At one point, he relied upon Blackstone, observing that the English Courts applied the authority, only to have Deemster Heywood reply: “That may be, but I am sworn to administer the laws here according to the ancient customs of the Island, and I will support them to the best of my ability”. Roper appears to have been confused as to the source of the criminal offence he was charged with and, having accepted that it was a Manx statute, persisted in placing an English defence before the jury. The summing up went against him, and he was found guilty ⁴.

Roper then petitioned the Lieutenant-Governor, who held a special court with Deemster Heywood, the Clerk of the Rolls, and the Waterbaliff. The six grounds of the petition are not relevant to this discussion - in the event the Court chose to treat the petition as a request for arrest of judgement, and granted it because the complaint was vague, uncertain, and defective. Once again, it is the interplay that is important.

¹Consider LUNTZ M., "Throwing off the chains: English precedent and the law of torts in Australia", (1989) in ELLINHAUS et al, The Emergence of Australian Law [Sydney] (1989); *de Lasala v de Lasala* [1980] A.C. 546 (Privy Council on appeal from Hong Kong); *Invercargill City Council v Hamlin* [1996] 1 All ER 756 (Privy Council on Appeal from New Zealand).

²*Bold v Roper* (1822) *Mona's Herald* 24 August. Because of the involvement of the Rising Sun in this case, this report is to be preferred.

³Also present were Mr. Llewelyn, and Mr. Gelling.

⁴The jury initially found him guilty of posting and publishing the poster - an illegal verdict which they altered to guilty of the misdemeanour charged.

Roper continued to place great reliance on English cases and texts, although he did boast of having read the Manx statutes from beginning to end and back again. Gelling, for Bold, took an extremely low view of Roper's learning, but himself made some use of English texts, although he noted:

“in this Island where we had the privilege of making our own laws and administering them, and where we had a practice [...] it was unnecessary to go to England, Scotland, or Ireland to learn or pursue practice differing from our own”.

Deemster Heywood, as a member of this second Court, took the opportunity to defend his conduct of the case at first instance. He cited English texts himself and noted “[I am] bound to administer justice according to the law of the land, although I shall always look to precedents and authorities from the English law, as guides in doubtful cases.”.

In this case we have a clear conflict between Roper, an Irish Barrister with little knowledge of Manx law and, it would appear, little respect for the Manx courts: and Manx advocates and judicial officers. Roper treated Manx law as a local peculiarity, to be disregarded in favour of English law and practice, while the advocates and officers were stung to a passionate defence of the basic inviolability of Manx law and practice, albeit tempered by a recognition of the value of English authorities in cases where Manx law and practice was unknown.

The next important case developed this theme. In 1824 Kelly was tried in the Court of General Gaol Delivery on a charge of burglary. Deemster Gawne's summing up was reported:

“the cases from the English law reports read by the Attorney General were certainly illustrative of what constitutes burglary. [Deemster Gawne] looked up with deference and high respect to the law of England; and where, in doubtful cases, our insular law required confirmation, he should always consider it his duty to refer to the English Code; but in the present case the crime was fully described in the statute law of the Island.”

He then read out the relevant section of the Code ¹. Thus, in *Kelly*, English cases were an important source where the law required confirmation but had no role to play where some Manx source could be regarded as stating the law and leaving no doubt ². In 1824 the Court regarded the Criminal Code as such a complete source.

The exact value of English authorities in such doubtful cases, where the Manx authorities were silent, remained unclear. J.C. Bluett, compiler of a book of precedents, dealt with the point in his introduction of 1847, in the passage reproduced above. Bluett put forward English decisions as the default in case Manx law was silent, but proposed that this default could, if the English decision was inappropriate for the Isle of Man, be replaced by a very wide ranging search. His explanation, in itself, suggests that there was some doubt at the time as to the

¹Kelly (1824) *Mona's Herald* 24 March.

²For good examples of the more typical, unreasoned, use of English authorities during this period see *Ronald v Scott* (1824) *Advocates Notebook* 52; *Garrett v Curphy* (1839) *Advocates Notebook* 182.

status of English decisions - Bluett may have been addressing a body of opinion in the legal profession of the day that treated English decisions, explicitly or implicitly, as of binding force. Given a pattern of citation and adoption of persuasive decisions, the danger existed that this practice could coagulate into a rule of practice.

The next important case does not deal with citation of English cases *per se* but provides an important contrast to the earlier case of *Kelly*. In *Coole* ¹, decided in 1869, the defendant was charged with assault with intent to murder, under section forty-three of the first Code. She had used poison and the question arose, in the Court of General Gaol Delivery, as to whether a poisoning without violence was an assault. The prosecutor cited an English case, and two English texts, to support this position; while the defendant argued that the case had been overruled and cited English texts to show that the statute ought to be construed in favour of the accused. The Deemster cited one of the English cases as “conclusive” that the administration of poison without great pressure or violence was not an assault, and the Court directed an acquittal. The case was described in the local press as a “wretched failure of justice” ² and it is clear that it turned upon a technical definition of assault taken from English law. The Code was no longer being treated as sufficient in itself, and, in the absence of Manx authorities upon the point, the English cases were adopted. On the evidence of this case, the adoption was uncritical, and other cases decided around the same time, including decisions of the Judicial Committee, show the same approach ³. *Coole* showed an increased reliance upon English cases to supplement Manx materials once considered free standing. In other words, while the earlier view of English authorities as irrelevant where a Manx authority existed remained, the sphere where Manx authorities would be considered adequate had shrunk. The increased complexity of legal doctrine in the nineteenth century led to an increase in the value of English cases.

The next case, *Ballacorkish Silver Mines v Dumbell*, decided before the Judicial Committee in 1873 ⁴ also indicates a shift from earlier attitudes. The facts of the case, which concerned Crown rights over waters, are less important than the reasoning of Lord Penzance in reversing the order of the Manx Chancery Court:

¹Coole (1869) *Mona's Herald* 24 November.

²Editorial, (1869) *Mona's Herald* 15 December.

³*Laboucher v Tupper* (1857) 11 Moo.P.C. 194, 14 E.R. 670; *Highways v M'Conchie* (1864) *Mona's Herald* 13 January; *Ingram v Drinkwater* (1873) Privy Council Printed Papers 1875/8 [Available at the Privy Council Office, London].

⁴*Ballacorkish Silver Mines v Dumbell* (1873) LR 5 PC 49.

“And that the order of the Court for an injunction should be reversed as not being justified by any established practice of the Courts of the Isle of Man, *and contrary to the practice of the Courts in England.*”¹

The significance of the emphasised section is clear. Points of law in the Isle of Man were to be justified by established Manx law, or by the law of England. The Panaclepts of Justinian, the Code Napoleon, and the law of Scotland, proximate or not, were not to be taken into account.

These two cases were evidence of an important development in the approach taken to English precedents in the latter half of the nineteenth century. After these cases, which represented evolution rather than revolution, English cases were, in the absence of local precedent or statute, effectively adopted by the Manx courts so uncritically as to be *de facto*, although never *de jure*, binding upon them².

This line of cases culminated in the consolidated appeal of *Frankland and Moore* to the Judicial Committee of the Privy Council. The earlier discussion of this case has established that it did not produce a rule binding upon the Manx courts, but rather a strong statement of good judicial practice. It would seem important, therefore, to explore the scope of good practice by analysing the principle stated. The dicta in *Frankland and Moore* were based upon Commonwealth decisions, so it appears appropriate to have recourse to Commonwealth authorities as an aid to this exploration.

We will consider, very briefly, when the principle of good practice applies, and then the exceptions to the principle when the Manx courts may freely depart from the principle while remaining within the bounds of good practice.

It is important to determine in what circumstances the Committee contemplated their statement being applied. The dicta of the Committee suggests three alternatives. First, that the English decision is to be followed where the point in question was agreed to be common to both English and Manx law ; second, that it is to be followed where the area of law in question is common to Manx and English law, although the point in question had not been considered in Manx courts ; and third, that it is always to be followed. The first option “simply begs the question, for whether or not the point of law is common to both countries

¹Emphasis added.

²From a very wide range see Cottier et al (1881) Manx Sun 19 February; Kelly (1889) Manx Sun 7 December ; Attorney General for the Isle of Man v Moore [1938] 3 All E.R. 263; Wood v Storey (1947) Unreported, High Baliff's Court [Law Society Library]; Laughlin (1968) Unreported, Staff Of Government [Law Society Library]; Hartley (1979) Unreported, Staff of Government [Law Society Library]; In Re C.B. Radio Distributors [1981-3] Manx L.R. 381; Caveney [1982] Unreported, Staff of Government [Law Society Library].

will depend on whether or not the [authority] is intended to be followed”¹. The authorities provide little guidance as to which of the latter two alternatives is correct². The scope of the principle must be determined, therefore, by the reasons the Judicial Committee considered it good practice. If the reasons are applicable to all areas of law, rather than just those where English doctrines have been freely adopted, then the latter view of the scope of the principle is likely to be correct³.

A premise embedded into the Manx legal system is that like cases should be treated alike, that, in the words of one of the most ancient Manx laws, “one Doome or judgement be not given at one time, and another Tyme contrary”⁴. While it may be true that breach of this principle produces justified resentment, it can hardly be extended to this situation. Just as society accepts that law may fairly change with time⁵, so it may be supposed to accept that individuals in different legal systems may be treated differently.

Another inapplicable argument is that the practice serves to reduce the power of the individual judge, and so produce “a blending of the value systems of both past and present judges, leaving room for both continuity and change”⁶. The constitutional history of the Island, and the local circumstances qualification suggested by the Judicial Committee, indicates that blending is not to be given paramount value, *per se*, in this context.

It could be argued that the practice aids efficiency - it allows judges to settle cases without constant reference to first principles and counsel to accurately predict the outcome of an action and so reduce expensive litigation⁷. In addition, it allows English trained members of the Manx bar to make best use of their training⁸, and of English legal texts⁹. This would

¹PARSONS R., "English Precedent in Australian Courts", (1948-50) 1 UWAALR 211.

²Consider Lunney [1972-2] Manx L.R. 92 which applied English law to the mental element in murder without recourse to the principle stated in Frankland and Moore. See also Pate (1981-3) Manx L.R. 130.

³See generally MALTZ E.M., "The Nature of Precedent", (1988-9) 66 NCL.Rev. 367; DOUGLAS W.O., "Stare Decisis", (1949) 49 Colum.L.Rev. 735.

⁴Customary Laws 1422 s.32-33.

⁵MALTZ E., *op.cit.*, (1988-9).

⁶*ibid.*

⁷Farrell v Alexander [1976] 2 All.E.R. 721.

⁸A survey in 1993 indicated that, of the thirty three advocates who answered the questionnaire, twenty-five were graduates of English Universities, of which sixteen were law graduates, and an additional respondent had successfully taken the English C.P.E..

⁹Consider PARSONS R., *op.cit.*, (1948).

apply to the wider ratio. It must be doubted, however, whether this is a valid argument. The ultimate in efficiency from this viewpoint would be a random number generator, suggesting that efficiency in the judicial process should not be given too much weight. Similarly, the convenience of those involved in the business of the law should not be given such weight in determining the content of law ¹.

A more controversial argument is that binding precedent disguises the judicial process as determined by “rules of law and not merely the opinions of a small group of men who temporarily occupy high office” ². The principle in *Frankland and Moore* reduces the embarrassment of Deemsters compelled to pull legal doctrines from a vacuum, while the usual mechanisms of avoidance, augmented by the exceptions to the principle, guarantee freedom of action. If this argument applies, it justifies the wider application of the principle. It is unlikely however that the Committee gave this argument much weight, since the local conditions exception exemplifies the importance of judicial opinion, and minimises the disguise.

The two most powerful arguments used to justify binding precedent are certainty and reliance ³. It can be argued that uncertainty in the law is itself an evil against public policy ⁴, which could be reduced by binding precedent ⁵. This argument appears fully applicable to the situation and would justify the wider application of the principle - by providing a method for ascertaining the content of completely unexplored areas of Manx law the principle reduces uncertainty. It seems likely that the certainty argument is the dominant reason for the principle. In that case, the wider interpretation best represents the considerations behind the principle.

It is important to consider the exceptions. Of these, three are expressly stated in *Frankland and Moore*. The first exception is where “there is some provision to the contrary in a Manx

¹The above is a statement of principle, which is often repeated by members of the judiciary wishing to emphasise that they decide cases according to law, without regard to the results of their decision. Whether this is actually the case is open to question. Nonetheless, the rhetoric of customary law does not, in the Manx and English tradition, take the strongly utilitarian view necessary if this consideration is to be decisive.

²*Florida Dept. of Health v Florida Nursing Home* (1981) 450 U.S. 147 at 154.

³Consider the discussion of proprietary estoppel in GRAY K., *Elements of Land Law*, [London] (1987) Chapter 13; *Ross Smith v Ross Smith* [1963] A.C. 280; *Birmingham City Corp'n v West Midland Baptists (Trust) Association* [1970] A.C. 874.

⁴*Barnett v Harrison* [1976] 2 SCR 531 (Supreme Court of Canada).

⁵cf. *Jones v Secretary of State* [1972] A.C. 944 (House of Lords).

statute". The second exception is where "there is some decision of a Manx Court to the contrary". These seem to reflect the earlier pattern of adoption.

The third exception is where there exist "local circumstances which would give good reason for not following the particular English decision". Some guidance can be found as to the scope of this exception from Commonwealth cases. A degree of caution must be shown when considering the Commonwealth line. The Commonwealth cases are concerned with construing statutory exceptions to a statutory rule, whereas the Manx courts are simply justifying departure from a model of good practice, albeit one laid down by the Judicial Committee. It is submitted that the discussion which follows represents the strictest, most legalistic approach likely to be taken by the Insular courts - the practical application of the exceptions is likely to be broader, albeit guided by these principles.

It seems that despite the term local, a comparison between Manx and English conditions is all that is required ¹ - the question of whether the rest of the world accords to Manx conditions, or to English conditions, is irrelevant. It is assumed that conditions are equivalent ² until a particular case arises ³, where a difference in conditions can be found ⁴, which justifies departure from the English decision.

It is difficult to predict which laws may be found inapplicable under this test ⁵, but no more precise general rule seems possible to formulate ⁶. Thus, we are left with a practice which relies upon the opinion of the judge in question ⁷. It has been suggested that the duty of the judges in this sort of situation is so unique as to be more "addressed to our judgement as prudent and right judging men than as lawyers and judges" ⁸. Insofar as this was a warning against legalistic consideration of the test, it appears to have been heeded by the

¹M'Hugh v Robertson (1885) 11 VLR 410 (Supreme Court of Victoria); State Government v Trigwell [1979] 26 ALR 67 (High Court of Australia).

²Uniacke v Dickinson (1848) 2 NSR 287 (Nova Scotia Ch.Ct.).

³G v C [1951] 3 DLR 138 (Supreme Court of British Columbia).

⁴As opposed to mere disapproval of the rule - Malowecki v Yachimye [1917] 1 WWR 1279 (Alberta Supreme Court - Appellate Division); Power v Meagher (1888) 21 NSR 184 (Nova Scotia Court of Appeal).

⁵Whicker v Hume (1858) 7 HLC 124 (House of Lords).

⁶M'Donald v Levy (1833) 1 Legge.39 (Supreme Court of New South Wales).

⁷Doran v Chambers (1887-8) 20 NSR 311 (Nova Scotia Court of Appeal); M'Donald v Levy (1833) 1 Legge 39 (Supreme Court of New South Wales).

⁸Uniacke v Dickinson (1848) 2 NSR 287 per Hill J. (Nova Scotia Chancery Court).

Commonwealth courts ¹. We may now turn to the factors which the Commonwealth courts have considered when making their decisions. These may be considered in three groups - social, geographical and legal.

The social factors include “the general conditions of ... public affairs and the general attitude of the community” ². This should be read very widely - certainly it includes the general view of the status of women ³, the moral worth of given groups ⁴, and the willingness of members of the community to act without reward ⁵. It also includes more easily ascertained facts such as the size of the population ⁶ and its division into religious ⁷, sexual, racial and age groups ⁸. It even includes the availability of services such as education ⁹, trade opportunities ¹⁰, and modern technology ¹¹. According to a recent Manx authority it may also include the extent to

¹On the important question of time of testing for local circumstances see ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 545-7; Brett v Young (1882) NZLR 1 SC 262 (Supreme Court of New Zealand); Hellens v Densmore [1957] SCR 768 (Supreme Court of Canada); Quan Yick v Hinds (1905) 2 CLR 345 (High Court of Australia); Cooper v Stewart (1889) 14 App.Cas. 286 (Privy Council on appeal from New South Wales); Cyr [1917] 3 WWR 849 (Alberta Supreme Court - Appellate Division); Rudick v Weathered (1889) 14 App.Cas. 286 (Privy Council on appeal from New Zealand); Tom v Shofer [1953] 1 DLR 356 (Nova Scotia Supreme Court); Maloney (1836) 1 Legge 74 (Supreme Court of New South Wales); State Government v Trigwell [1979] 26 ALR 67 (High Court of Australia); Penhas v Tan Soo Eng [1953] A.C. 304 (Privy Council on appeal from Singapore); Horse & Carriage Inn v Baron [1975] 53 DLR (3d) 426 (British Columbia Supreme Court); BOUCK J.C., "Introducing English Statute Law into the Provinces: Time for a Change", (1979) 57 Can.B.Rev. 74. cf. Bagshaw v Taylor (1978) 18 SASR 564 (Supreme Court of South Australia); Horse & Carriage Inn v Baron [1975] 53 DLR (3d) 426 (British Columbia Supreme Court); Qualtrough (1987-9) Manx L.R. 242; Gallagher (1983) Manx High Court, Unreported [Law Society Library].

²Cyr [1917] 3 WWR 849 (Alberta Supreme Court Appellate Division).

³ibid.

⁴Smith v M'Donald (1863) 5 NSR 278 (Nova Scotia Court of Appeal).

⁵Power v Meagher (1888) 21 NSR 278 (Nova Scotia Court of Appeal).

⁶M'Hugh v Robertson (1885) 11 VLR 410 (Supreme Court of Victoria). This factor is probably rarely decisive - see de Baun (1901) 3 WAR 1 (Western Australia Full Court).

⁷Re Purcell (1895) 21 VLR 249 (Supreme Court of Victoria).

⁸M'Kenzie v M'Kenzie (1970) 73 WWR 206 (British Columbia Court of Appeal).

⁹ibid.

¹⁰Valentine (1871) 10 SCR (NSW) 113 (Supreme Court of Victoria).

¹¹Tom v Shofer [1953] 1 DLR 356 (Supreme Court of Nova Scotia).

which Manx people “would wish to have their criminal justice administered in a basis more oppressive to the defendants than what appertains in England”¹.

Geographical features include the proportion of terrain types², as well as the types of indigenous flora and fauna³. While the flora and fauna of the Isle of Man is very similar to that of England, the small size of the Isle of Man could be important, if only because of the consequent high proportion of coastal areas⁴.

Legal factors are similarly wide. Thus, the rationale of the rule under consideration could be important⁵, as may be the general legal background⁶, the attitude of the legal profession⁷, and of the local legislature⁸, the machinery of law enforcement⁹, and the local constitution¹⁰.

It should be clear from the above that the courts are to take a liberal view of the possible local conditions which would justify ignoring the principle laid down in *Frankland and Moore*, but

¹Gray (1990-2) Manx L.R. 74 per Field-Fisher J.A..

²Makowski v Yachimyc [1917] 1 WWR 1279 (Alberta Supreme Court Appellate Division).

³Campbell v Kerr (1886) 12 VLR 384 (Supreme Court of Victoria).

⁴For a fuller geographical discussion of Mann, see CURTI G.P., The Isle of Man: The Geographical Factors in the Evolution of a Political Enclave, [Unpublished] (1960) [Manx Museum Archives].

⁵Consider Doe v M'Fadden (1836) 2 NBR 260 (Supreme Court of New Brunswick); British Columbia Paper (1954) 11 CCC 3 (Supreme Court of British Columbia); M'Hugh v Robertson (1885) 11 VLR 410 (Supreme Court of Victoria); Cooper v Stuart (1889) 14 App.Cas. 286 (Privy Council on appeal from New South Wales).

⁶Re Simpson [1927] 3 WWR 534 (Alberta Supreme Court - Appellate Division); Power v Meagher (1888) 21 NSR 184 (Nova Scotia Court of Appeal); Cooper v Stuart (1889) 14 App.Cas. 286 (Privy Council on appeal from New South Wales); R.C. Condoo v C.C. Mooherjee (1876) 2 App.Cas. 186 (Privy Council on appeal from Bengal).

⁷Uniacke v Dickinson (1848) 2 NSR 287 (Nova Scotia Chancery Court); Power v Meagher (1888) 21 NSR 184 (Nova Scotia Supreme Court); Farrell (1831) 1 Legge 5 (Supreme Court of New South Wales).

⁸Uniacke v Dickinson (1848) 2 NSR 287 (Nova Scotia Chancery Court); Porter (1888) 20 NSR 352 (Nova Scotia Supreme Court); Mayor of Lyons v East India Co. (1836) 1 Moo.P.C. 175 (Privy Council on appeal from Bengal).

⁹Meanwell v Meanwell [1941] 1 WWR 474 (Manitoba Court of Appeal); Porter (1888) 20 NSR 352 (Nova Scotia Supreme Court); Mayor of Lyons v East India Co. (1836) 1 Moo.P.C. 175 (Privy Council on appeal from Bengal).

¹⁰ex p. King (1861) 2 Legge 1307 (Supreme Court of New South Wales); Cooper v Stuart (1889) 14 App.Cas. 256 (Privy Council on appeal from New South Wales).

not necessarily that they should be easily satisfied that the condition suggested exists, and is of sufficient significance to justify departure ¹.

A further exception, where it would not be good judicial practice to follow the English decision, is where the decision was wrong ². In *Frankland and Moore* a House of Lords decision was rejected because of criticism in later cases. Since the criticism was purely *obiter dictum*, these decisions could not have been cited in order to show that the earlier case had been over-ruled, but in order to show that it incorrectly stated English law ³. Thus, if the Manx Court is satisfied that a given case did not correctly state English law, it would be bad practice to adopt it. It may be that, for instance, a Deputy High Bailiff would be reluctant to declare that a decision of the House of Lords, on English law, was wrong. It is possible that the Manx courts will reject the judgements of the superior English courts on English law primarily where an English statute effectively protects a widely criticised decision from all possibility of repeal. An interesting variant on this theme is *Re Barr and Others* ⁴. Hytner J.A., on appeal from the First Deemster, noted that, in the absence of declared Manx law, English common law was to be applied, but not slavishly, so that an English decision which had been superseded by a statute should not be adopted.

An even wider application of this exception was proposed in *Pate* ⁵ where it was said that:

“Where a decision of the House of Lords or English Court of Appeal can be said to be an affront to common sense and any sense of justice that, in our view, constitutes a sufficient special circumstance to warrant this court in refusing to follow it.”.

Pate was decided before the Judicial Committee decided *Frankland and Moore*, and it could be argued that the failure of the Judicial Committee to endorse this dictum reduces its strength. The strength of this proposed exception to the principle depends upon the status of the principle in *Frankland and Moore* as a mere guide to good practice - it is difficult to conceive of a judge adopting the above view of a case, and then applying it in the Isle of Man.

¹See *Leong v Lim Beng Chye* [1956] A.C. 648 (Privy Council on appeal from the Supreme Court of Malaysia).

²An additional exception to this rule, which is not implicit in any of the cases, is suggested by the existence of Deemster Parrs Abstract on Manx law - an unpublished manuscript of similar status in Manx law as the writings of Coke in English law. It is submitted that where an extra-judicial source of sufficient authority exists which indicates that the Manx law is distinct from the English law, even in the absence of a decision on the point, then the principle may not apply.

³On a narrower basis, there appears no reason why the *per incuriam* rule should not apply - see *Baker* [1975] A.C. 775 (Privy Council on appeal from Jamaica).

⁴*Re Barr and Others* (1992) 19 Manx L.B. 48.

⁵*Pate* (1981-3) Manx L.R. 130.

Frankland and Moore has laid down a loose, commonsense set of guidelines for the application of English decisions. The Manx bar continues to treat English authorities as extremely important in the absence of a Manx authority. The local conditions exception suggested in *Frankland and Moore* is not to the fore in their minds, nor are subtleties as to the court producing the authority. It is clear, therefore, that English authorities are of vital importance in the Manx courts.

Factors Leading to the Adoption of English Common Law by the Manx Courts.

It is clear from the above discussion that the English common law, while never formally adopted by the Manx courts, has had an enormous influence upon the development of Manx customary law. So enormous, indeed, that it may be fairly said the Isle of Man has become, for many purposes, a common law jurisdiction. A number of factors explain this adoption.

Firstly, adoption of English decisions follows after a failure to locate a relevant Manx decision. Thus, the poor availability of Manx precedents encourages adoption of English decisions. In part, this poor availability sprang from the inevitably low number of cases decided by the Manx Courts. The Isle of Man is a micro-jurisdiction, with only a small number of reasoned judgements delivered each year, and it is very unlikely that all points raised in a dispute will have been decided by a Manx court. Additionally, the decisions which do exist have not always been easily available, suffering in particular from poor indexing. As Paliwala noted in a global context "Documentation is power, the better documented legal system always dominates over the less well-documented" ¹. Poor documentation not only prevents advocates and judges locating relevant decisions, but can produce problems of verification. In *Bold v Roper* ², Roper cited *Mills v Jefferson*, a case before Deemster Gawne. Deemster Gawne was not then present in court, but Deemster Heywood was, and informed Roper that he had been counsel in that case, and Roper's recollection of it was wrong. Roper replied that Mills, an advocate then in court, had told him of the judgment. Deemster Heywood indicated that, in that case, Mills should have known better. Thus, the court had to decide, not only what the earlier case meant, but what the actual judgement had said.

Secondly, in the absence of a Manx precedent, the Court has to find a solution somewhere. In many cases, a Manx judge is required to consider a novel point of law which has already been discussed in a line of cases from another jurisdiction. If the line of cases develops a consistent solution, the judge may prefer to adopt it, expressly or implicitly, rather than develop by themselves a solution of equal merit. A judge may also be reluctant to trust their

¹Cited in TWINING W.L., "Law Publishing and Information in Small Jurisdictions", (1978) Meeting of Law Officers of Small Commonwealth Jurisdictions 60.

²*Bold v Roper* (1822) *Mona's Herald* 30 August.

judgement over that of a line of other judges, or be reluctant to expend the time and effort involved in re-analysing the situation from first principles ¹.

Thirdly, given the value of foreign jurisdictions in determining a point of law, there are practical benefits in relying upon one jurisdiction in particular. By providing a source of legal reasoning which would probably be relied upon by the Manx courts, the practice reduces uncertainty as to the content of areas unconsidered by the Manx courts ². As this practice became established individuals and their legal advisers developed a legitimate expectation that the practice would be applied to their case. This point was brought out very well in *Goldsmith's Case*, a civil case decided in 1911 ³. Counsel argued that a particular English rule had never been adopted by the Manx court, and so the court was free to adopt a more equitable practice. The Deemster rejected this approach decisively:

“to adopt this argument would involve endless confusion, and would be to the prejudice of the Manx courts and legal profession. No one would know where they stood.”

Finally, given the above, there are pressing reasons why the legal system selected should be that of England. From an early date ⁴ it was recognised that the English courts produced decisions of considerable value for the Manx courts - in part due to the abilities of the judges, and in part due to their relevance to a legal system which, even before Revestment, had made use of English materials. A number of other important factors also need to be drawn out.

In the first place, English materials were more easily available, for geographic and linguistic reasons, than those of the continental nations or even Scotland. This can be seen in the regular citation of English textbooks and case reports from an early date, and materials held locally which eventually entered the Manx Museum and Law Society Reference Library.

Additionally, the legal education and experience of the judiciary, and to a lesser extent of the Manx Bar, is important. The Manx Bar not only provides the recruiting pool for the principal judicial officers, but is also responsible for preparing arguments to be heard by the judicial officers. Where the judicial officer is experienced at the English bar, rather than the Manx, it is to be expected that they would utilise their previously acquired knowledge, and apply English law to the case before them ⁵. The existence of benefits for English solicitors and

¹See CARDOZO B., *The Nature of the Judicial Process*, [Boston] (1923) 149.

²See *Barnett v Harrison* [1976] 2 SCR 531 (Supreme Court of Canada). cf. *Jones v Secretary of State* [1972] A.C. 944 (House of Lords).

³*Goldsmith's Case* (1911) reported in MOORE R.B., *The Isle of Man and International Law*, [Douglas] (1926) Chapter 8.

⁴See for instance *Kelly*, discussed above, and the words of Bluett, reproduced above.

⁵See Corlett (1887) *Manx Sun* 14 May.

barristers seeking to qualify in the Isle of Man encouraged knowledge of English law, and thence a preference for the familiar forms of English law.

Finally, after Revestment in 1765 the Manx Bar became a professional body. Professional bodies generally rely upon some special expertise to consolidate their position and privileges. A non-professional with a degree of eloquence can appeal to general principles of justice and efficiency. It takes a learned professional to locate and cite English case-law illustrating legal doctrine which can then be applied to the Isle of Man. The Manx legal profession is discussed more fully elsewhere ¹.

Conclusions.

At the start of the nineteenth century English authorities were considered as useful guides to the content of Manx law, including Manx customary law in doubtful cases where local sources did not provide an answer to the legal point in question. In at least one area, that of criminal law, local sources were considered to answer many legal points, thus reducing the need for recourse to English authority.

Arguably, however, English authorities were not decisive even where Manx authorities were silent on the point. They were treated as merely persuasive and could, if inappropriate, be rejected in favour of another jurisdiction or, presumably, of a novel Manx formulation of doctrine.

By 1873, both these limits on the application of English authorities had been eroded. The perceived need for legal materials from another jurisdiction had increased, reducing the scope for reliance upon Manx authorities. At the same time the possibilities of a wider ranging search had been discounted: if Manx law was lacking, the solution was to be found in the law of England, and of England alone.

While English cases never became binding upon the Manx courts, during the twentieth century it became universal practice to rely upon them when determining novel points. This trend reached its apothesis in *Frankland and Moore*, where English cases on common law were generally to be followed in determining the content of Manx customary law.

The eclipse of local sources in favour of a culture of adoption sprang from two features of the Manx legal system: relatively poor documentation of a limited number of Manx cases, combined with a need for sources of legal doctrine brought about by the increasing demands of professional advocates trained, or at least exposed to, the English legal tradition. In the circumstances, the dominance of English authorities was both to be expected, and of probable benefit to the Manx legal system.

¹ See p.150.

Precedents from Other Jurisdictions.

The Isle of Man shares some characteristics with other very small jurisdictions, and with other dominions of the British Crown ¹. Thus, cautious use of materials relating to these jurisdictions can be justified when considering Manx developments ².

Conclusions.

The Isle of Man is a very small jurisdiction, and thus produces a very small number of significant precedents, especially when compared with the wealth of material produced by the English jurisdiction. What material does exist is not always easily available, or easy to identify. These are common problems in micro-jurisdictions, and it is unsurprising that those working within the Manx legal system have had extensive recourse to English precedents in developing Manx law. The long history of osmosis has contributed to Manx law bearing a close resemblance to English law, thus increasing the value of English precedents, and increasing the potential for osmosis. It remains to be seen whether the vast improvement in documentation of Manx precedents will alter this culture of adoption in the future.

¹Consider CAIN T.W., "The Legislative Draftsman in a Small Jurisdiction", (1990) 11 Statute Law Review 77 which emphasises the common ties of those jurisdictions with less than 250,000 inhabitants which are, or were, possessions of the British Crown.

²It is worth noting that some indexing systems, notably some of the earlier Home Office files in the Public Records Office, class the Isle of Man with the Channel Islands.

Chapter Five: Sources of Law - Other Sources of Law.

This chapter considers a number of disparate materials which can influence the exercise of more formal law making powers. Additionally, some other materials useful to understanding Manx law are also discussed.

International Law.

The British Executive, even before Revestment, was responsible for the foreign relations of the Isle of Man. In practice, this gives the British Executive the power to enter into treaties whose effect extends to the Isle of Man¹. This section considers the effect of international law in the Manx courts ².

It is clear that customary international law should, in the absence of contrary authority be applied in the Manx courts ³. More important than this form of international law, however, is conventional international law ⁴. A strong Judicial Committee decision, on appeal from the

¹ See p.128.

²On the authorities to be used when determining the status of international law in Manx courts see SIEDL-HOHENVELDERN I., "Transformation or Adoption of International Law in Municipal Law", (1962) 12 I.C.L.Q. 88; TRIMBLE P.R., "A Revisionist View of Customary International Law", (1986) 33 U.C.L.A.L.Rev. 665; KELLY M.E., "Customary International Law in United States Courts", (1987) 32 Vill.L.Rev. 1089; SCOBLE A.M., "Enforcing the Customary International Law in Federal Courts", (1984) 74 Cal.L.Rev. 127; STARKE J.G., Introduction to International Law, [London] (1984) 80-2; WHYTE G.F., "The Application of the European Convention on Human Rights and the Domestic Courts", (1962) 35 Br.Y.B.I.L. 445.; Kaur v Lord Advocate, 1981 S.L.T. 322 (Outer House of the Court of Session); Attorney General for Canada v Attorney General for Ontario [1937] A.C. 326 (Privy Council on appeal from Supreme Court of Canada).

³See Cheung Chi Chung v R [1939] A.C. 160 (Privy Council on appeal from the Full Court of Hong Kong); DICKINSON E.D., "Changing Concepts in the Doctrine of Incorporation", (1932) 26 Am.J.Int.L. 239; STARKE J.G., op.cit., (1984) 22-6; COLLIER J.G., "Is International Law Really Part of the Law of England", (1989) 38 I.C.L.Q. 924; DUNBAR N.C.H., "The Myth of Customary International Law", (1983) 8 Aust.Y.B.I.L. 1; HAHLO H.R. & KAHN E., The South African Legal System and its Background, [Cape Town] (1968); VANEK D.C., "International Law and the Law of Canada", (1949-50) 8 Toronto L.R. 251.

⁴See The Parlement Belge (1879) 4 P.D. 129; Attorney General v British Broadcasting Corporation [1980] 3 W.L.R. 109 (House of Lords); See Grieve v Edinburgh & District Water Trustees, 1918 S.C. 700 (Court of Session); Kaur v Lord Advocate (1981) S.L.T. 322 (Court of Session); For Manx purposes the best is Walker v Baird [1892] A.C. 491 (Privy Council on appeal from Supreme Court of Newfoundland); See especially, Simsek v M'Phee (1982) 56 A.J.L.R. 277 (High Court of Australia).

Supreme Court of Canada, appears to have established the basic rule in Manx law. Lord Atkin noted:

“Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not, within the Empire, by virtue of the treaty alone have the force of law.”¹.

Lord Atkin sought to ascertain the content of Canadian law by reference to this general principle, thus making it *ratio decidendi* and, as it is applicable to Manx courts, binding upon them. The weakness of separation of powers doctrine in the Isle of Man is immaterial, since it may be observed that separation of powers has been weak in other dominions of the British Crown. Thus, the Manx courts would be expected not to enforce international treaties *per se*, and this has proved to be the case².

In three instances, however, the Manx courts have given some weight to international treaties when exercising judicial functions³- interpretation of statutes⁴; development of Manx customary law⁵; and the exercise of judicial discretion. In the Staff of Government decision of *O'Callaghan v Teare*⁶ it was held as *ratio decidendi* that where a number of exercises of judicial discretion were lawful, those in harmony with international law were to be preferred⁷. This case seems based on the broad principle that the judiciary should exercise all their

¹Attorney General for Canada v Attorney General for Ontario [1937] A.C. 326 (Privy Council on Appeal from the Supreme Court of Canada).

²See the cases discussed below.

³cf. ex p. Bhajan Singh [1975] 2 All.E.R. 1081 (Court of Appeal); ex p. Salamat Bibi [1976] 3 All E.R. 843 (Court of Appeal); Pan-American Airlines v Department of Transport [1976] 1 Lloyd Reports 257 (Court of Appeal); ex p. Kirkwood [1984] 2 All E.R. 390 (Queen's Bench Division).

⁴Solomon v Commissioners of Customs and Excise [1966] 3 All E.R. 871 (Court of Appeal); Cooperative Committee on Japanese Canadians v Attorney General for Canada [1947] A.C. 87 (Privy Council on appeal from Supreme Court of Canada); Finnegan v Clowney YPT [1990] 2 All E.R. 546 (House of Lords); DUFFY P.J., "English Law and the European Convention on Human Rights", (1980) 29 I.C.L.Q. 585; GANE C., "The European Convention on Human Rights and Municipal Law - A Scottish view", (1982) 4 Liverpool L.Rev. 169; In Re Piracy Jure Gentium [1934] A.C. 586 (Privy Council: Special Reference); Sallis (1989) 12 Manx L.B. 82.

⁵See Attorney General v BBC [1980] 3 All E.R. 161 (House of Lords); Schering Chemicals v Falkman [1981] 2 All E.R. 321.

⁶O'Callaghan v Teare [1981-3] Manx L.R. 103.

⁷ See p.130.

functions, as far as lawfully possible, in harmony with the international obligations of the state.

Academic Writings.

Academic writings in the Isle of Man, as in England, are only secondary sources of law. Nonetheless, it is worth discussing the academic writings available for study of Manx law.

The Manx Museum is a fine source of academic writing on the Manx jurisdiction. As well as a number of general histories ¹, the Museum contains: short academic texts dealing with particular aspects of Manx law ²; off-cuts of relevant articles taken from the Manx press ³; contemporary statements of legal principle ⁴; Manx government reports ⁵; biographies of Manx figures ⁶; and letters on legal matters ⁷. Additionally, a number of post-graduate dissertations are available from the Manx Museum ⁸.

There are also a number of Manx periodicals containing original articles and reprints of source material, often accompanied with useful notes. The *Manx Society* is a valuable reservoir of source materials ⁹, while *Yn Lior Maninagh* ¹⁰, *Proceedings of the Isle of Man Natural History and Antiquarian Society* ¹¹, and the *Journal of the Manx Museum* ¹² concentrate more on publishing the product of research. The *Manx Law Bulletin* ¹³, although

¹For instance, KINVIG R.H., The Isle of Man: A Social, Cultural and Political History, [Douglas] (1975).

²For instance, MOORE R.B., The Isle of Man and International Law, [Douglas] (1926).

³For instance, MOORE R.B., "The Romance of Manx Common Law", (1927) Ramsey Courier 11 November.

⁴For instance, JOHNSON J., The Jurisprudence of the Isle of Man with the History of its Ancient Constitution, Legislative Government, and Extraordinary Privileges together with the Practice of the Courts etc., [Douglas] (1811).

⁵For instance, Report of the Joint Working Party on the Constitutional Relationship between the Isle of Man and the United Kingdom, [Douglas] (1969).

⁶For instance, MOORE A.W., Manx Worthies, [Douglas] (1901).

⁷For instance, the letter concerning the Manx punishment for rape, catalogued as MS. 4790.

⁸For instance, HORNER S.A., The Isle of Man and the Channel Islands: A Study of their Status under Constitutional, International and European Law, [Florence] (1984).

⁹Manx Society, 1859-1894.

¹⁰Yn Lior Maninagh, 1880-1905.

¹¹(1906-1991) I.O.M.N.H.A.S. (P.).

¹²(1924-1980) J.M.M.

¹³(1980-1993) Manx L.B..

primarily intended to keep the Manx legal profession up to date, contains useful case-notes, and some articles on the Manx legal system. A number of authors have written on Manx law in English and other periodicals ¹.

A number of academic writings merit special discussion. Deemster Parr, sometime in the 1690s, prepared a manuscript *Abstract of Manx Laws*. While never published, this document is regarded as an authoritative source on early Manx law. Second, James Gell, Attorney General of the Isle of Man for thirty two years, was an active writer on constitutional law and history. His works, while not widely distributed, are extremely valuable, and a full list is given in the Bibliography. His opinions on contemporary legal issues can also be found in his letters to the Lieutenant-Governors during his time in office. Third, in 1900 A.W. Moore published his *History of the Isle of Man*, an authoritative study of Manx history which was reprinted in 1977. While regarded as a standard historical source, this work is stronger on general background than on specifically legal history. The section on constitutional history, however, was prepared with the assistance of James Gell. A new, five volume, edition of the *History* is currently being prepared by a number of contributors. Finally, in 1979 D.G. Kermode published *Devolution at Work*, a study of the development of Manx political life between 1866 and 1978, and the interaction between the legislature and the United Kingdom government.

Consensual Law-Making.

In an adversarial system, the advice of counsel as to whether or not to pursue or defend a legal action through the courts can be decisive. If counsel for the plaintiff and the defendant both believe that the law on a given point is settled beyond reasonable likelihood of reversal, then neither are likely to raise the issue in court and allow the point to be settled by more formal law-making processes. This sort of transaction can have especial weight in a small bar where counsel interact closely and, to some extent, rely upon one another for legal information ². A documented source relevant to this consensual law-making is available

¹For instance, FARRANT R.D., "Isle of Man Legislation", (J.Comp.Leg. 3d ser 28:23-24); FARRANT R.D., "Constitution of the Isle of Man" (25 LQR 255).

² See EDGE P.W., "Lawyers' Empires: The Anglicisation of the Manx Bar and Judiciary", [1994-5] 19 Journal of the Legal Profession 29 at 46.

within the Manx Museum, whose collection includes internal government memoranda ¹, miscellaneous papers ², and Letter-Books of the Lieutenant-Governor ³.

Other Materials Relevant to Legal Research.

Manx newspapers are available for consultation on microfilm at the Manx Museum ⁴. It is worth briefly noting that the earliest Manx newspaper was the *Manks Mercury* published from 1793, and that the Manx Museum retains substantial, but incomplete, collections of fifteen other titles on micro-film ⁵. As well as discussion of controversial issues of the day, some details of debates of the legislature, and proceedings in court, can be found in these publications.

Extra-legal sources are also available at the Manx General Reference Library. After 1887 the debates of Tynwald were published and bound regularly. These debates, which are basically indexed, can be consulted at the General Reference Library. Before 1887, reports of the Debates of Tynwald could be found in the Manx newspapers discussed above. In most cases, however, the proceedings of technical Bills, such as those dealing with reform of the criminal law, are not detailed. An alternative, but extremely brief, source of pre-1887 legislative discussion is the *Journal of the House of Keys*, available at the Manx Museum.

British government reports have considered the Manx constitution ⁶. The most valuable source of materials in the United Kingdom is the Public Records Office. Materials relevant to

¹For instance, Memorandum prepared by the Attorney General on the Constitutional Position of the Isle of Man with Relation to the Imperial Parliament, [Douglas] (1944).

²For instance, the correspondence concerning the Code of 1872, catalogued under Acts; Constitution and Crime.

³These are a valuable source of material, as an index, albeit of variable utility, is available.

⁴See CUBBON W., A Bibliographical Account of Works Relating to the Isle of Man with Bibliographical Memoranda and Copious Literary References, [Oxford] (1933).

⁵Manks Advertiser (1801-1834, 1837-1842); Rising or Manx Sun (1821-1906); Weekly or Isle of Man Gazette (1812-1815, 1818-1819, 1822); Mona's Herald (1833-1975); Isle of Man Times (1869-1937, 1939-1977, 1978-1987); Isle of Man Examiner (1880-date); Peel City Guardian (1882-1982, 1987-date); Manxman (1895-1900); Ramsey Courier (1889-1904, 1908-1909, 1912); Green Final (1935-1940, 1947-1971); Manx Star (1971-1987); Isle of Man Courier (1982-date); Ramsey Chronicle (1987-date); Manx Independent (1987-1992); Isle of Man Gazette (1985-7).

⁶For instance, Relationships between the United Kingdom and the Channel Islands and the Isle of Man, [Douglas] (1973) (being excerpts from the Report of the Royal Commission on the Constitution, 1969-1973).

Manx law and history can be found in a number of different files kept by the Public Records Office ¹, and in the archives of British government departments ². Additionally, the British Museum contains materials relevant to the Isle of Man ³.

¹This author has had recourse to HO 31; HO 42; HO 44; H.O. 45; HO 49; HO 98; HO 99;HO 100; HO 122; HO 123; HO 144; HO 184; HO 219; HO 221; HO 246; HO 273; HO 284; HO 351; LO 2; LO 3; PC 1; PCAP 1-3; SP 45; SP 48.

²The extent to which these Departments are willing to cooperate with researchers varies considerably.

³See the anonymous guide to these materials, compiled in 1985, and catalogued in the Manx Museum as MD 1005.

Part II: The Manx Constitution.

Chapter Six: A Brief Constitutional History.

The purpose of this overview is to chart the basic form of Manx legal and political development between 798 and 1996. The first two sections of this overview provide the historical background on the Isle of Man before the establishment of stable government and preservation of legal records. The third section discusses the rule of the vassal Lords of the Isle of Man to 1765, while the last sections discuss developments since that date.

The Isle of Man before 1266.

In the absence of adequate sources, little can be gained by speculative discussion of the pre-Celtic inhabitants of the Isle of Man, or the early Celts ¹. Instead, this section discusses the Isle of Man in 798, when the Scandinavian influence, which grew to displace the Celtic, was first felt ².

In Celtic times, legal practices in the Isle of Man were presumably similar to those in neighbouring Celtic kingdoms ³. Certainly, there is evidence that the Isle of Man was part of the Celtic culture of the area ⁴, not least the large number of surviving Celtic place-names ⁵. In the light of this, an analogy may be drawn between the Manx legal system and Celtic systems elsewhere.

The Celtic system of government focused upon the King. Beneath the King, by rank, came the nobles, the freemen, and finally the unfree. All, except the unfree, had a role in the open air fair, the principal institution of government. Insofar as the distinction is rational, the principal business of this institution was judicial rather than legislative. The King, in consultation with his nobles, made such decisions as were meet, and declared them to the assembly of freemen, with the expectation that they would be adhered to. Most judicial business, however, was undertaken by the *Briw*, whose office was hereditary and jurisdiction consensual. The *Briw* reduced bloodshed, caused by arbitration by arms, by providing an acceptable means of negotiation and non-violent settlement. The role of the government in legal matters, however, was minimal ⁶.

¹See CHADWICK N.K., Celtic Britain, [London] (1964); MOORE A.W., "Early Connection of the Isle of Man with Ireland" (1889) Eng.Hist.Rev. 4,714; MYLES D. & CHADWICK N.K., The Celtic Realms, [London] (1967); GREGOR B.D.B., Celtic: A Comparitative Study of Six Celtic Languages, [London] (1980).

²See p.106.

³See A.W. MOORE, 31-81.

⁴A.W. MOORE, 46.

⁵MOORE A.W., The Surnames and Placenames of the Isle of Man, [Douglas] (1891).

⁶A.W. MOORE, 44-81, especially 59-63.

It has been suggested that Manx customary law was essentially Celtic, albeit much modified by later influences ¹. The same author noted, however, that the Manx system was unique to the Isle of Man, “and bore but little likeness to that of any other Celtic country”². In the absence of contrary evidence, the Manx legal system is better viewed as based upon Scandinavian models, albeit with some Celtic characteristics ³. Accordingly, it is appropriate to turn from the Celtic to the Scandinavian systems of government.

The first recorded attack on the Isle of Man by the Scandinavians was in 798, when Inis-Patrick, usually identified as Peel Island in the Isle of Man, was burnt by “gentiles”, or northern raiders ⁴. There is evidence of Scandinavian settlement in the Isle of Man during the following century, but it was not until an exodus of political refugees from Norway that the Isle of Man became a Scandinavian kingdom ⁵.

After Harald Haarfager established himself as sole sovereign in Norway *circa* 883, his firm rule caused many to emigrate to the Isle of Man. Harald followed these refugees, conquering their territories, and established the Sudreys - a political unit including the Hebrides, the southern Scottish isles, and the Isle of Man. This Scandinavian kingdom survived until 1266 and is worthy of some discussion.

The Sudreys included the Hebrides and the Isle of Man. In 1156, as a result of conflict between Godred II of the Sudreys and Somerled of Argyll, the Kingdom was split. The Hebrides remained associated with the Isle of Man until 1263, when they were conquered by Alexander III of Scotland. The loss of the Hebrides, which followed a collapse of Norwegian military power, led King Magnus of the Isle of Man to pay homage to the King of Scotland. Shortly afterwards Magnus died in the Isle of Man. A treaty between the Kings of Norway

¹MOORE R., "Manx Customary Laws", (1924) 1 J.M.M. 19.

² *ibid.*

³KINVIG R.H., The Isle of Man. A Social, Cultural and Political History, (Liverpool) 1975, Chapter 5. STENNING E.H., Portrait of the Isle of Man, [Douglas] (1978), Chapter 4. "[Manx] history is reflected in the development of local law which has a Norse customary base, with some feudal elements introduced into Scots law, modified by several centuries of influence by English legislation and common law" - TWINING W.E. & UGLOW J., Legal Literature in the Isle of Man, [M.M.A.] (1978).

⁴A.W. MOORE, 85.

⁵See CURTI G.P., The Isle of Man: The Geographical Factors in the Evolution of a Political Enclave, [M.M.A.] (1960). See generally MARSTRANDER C.J.S., The Norse Colonisation of the Isle of Man, [Douglas] (1960) trans. FARRINGTON J.; MEGAW B., "Norsemen and Natives in the Kingdom of the Isles", (1976) *Scottish Studies* 20; YOUNG G.V.C., The History of the Isle of Man under the Norse, [Peel] (1981).

and Scotland was concluded in July of 1266, by which the Sudreys were ceded to the King of Scotland in return for four thousand marks ¹.

A key feature of the later Manx constitution arose during the Scandinavian period. The Kings of the Isle of Man were, almost invariably, bound in service to a more powerful monarch. The exact nature of this bond varied, as did the identity of the other party. Indeed, there is evidence from this fluctuation of suzerain that the King of the Isle of Man was an independent force in the area, changing allegiance for his best advantage. A brief, partial, list of suzerains illustrates the point - King Edgar of England, 973; King Diarmid of Dublin, 1060; King Magnus Barefoot of Norway, 1093; King Henry II of England, 1156; King John of England, 1205; King Inge of Norway, 1208; King John of England, 1213; King Henry III of England, 1218; Pope Honarius III, 1219; King Hakon of Norway, 1239; King Alexander III of Scotland, 1264. This selective list illustrates the flexible nature of the relationship during this period. Later, vassalage was to become more binding and thus legally significant.

Many elements of the internal Manx constitution also date from this period, the most important of which was the Tynwald.

The Manx Tynwald of this period was similar to the *ping* of Norway, and *Al-ping* of Iceland ². A description of Tynwald written in the fifteenth century indicates this relationship, as does the probable derivation of the name Tynwald - *ping-vollr*, or Parliament-plain ³. A useful starting point for discussion of the role and composition of Tynwald lies in the detailed declaration of 1417 ⁴, which, insofar as it resembles the *ping* and *Al-ping*, would appear to reflect the practice of the Scandinavian period.

In 1417 King John II, the second of the Stanley family to be King of the Isle of Man, visited his realm to deal with a serious uprising against his Governor ⁵. Tynwald declared a number of customary laws, the first of which concerned the form of Tynwald:

“Our Doughtfull and Gracious Lord, this is the constitution of old time, the which we have given in our days, how yee should be governed on your Tynwald day. First, you shall come thither in your Royal array, as a King ought to do, by the Prerogatives and Royalties of the Land of the Isle of Man. And upon the Hill of Tynwald sitt in a chaire, covered with a Royall cloath and cushions, and your visage into the East, and your Sword before you, holden with the point upward; your Barons in the third degree sitting beside you, and your

¹Manx Society 22,227; Manx Society 23,323.

²See KERMODE P.C.A., "Iceland and the Althing", (1931) *Mona's Herald* 17 February.

³See Manx Society 12,11; YOUNG G.V.C., The History of the Isle of Man under the Norse, [Peel] (1981) Chapter 9. For a more exotic discussion, indicating the derivation is "fire of Baal", see "Account of the Court of Tin-Vaal", (1828) *Manx Sun* 2 September.

⁴See also KELLY R., The Vikings and Tynwald, [Douglas] (1971).

⁵A.W. MOORE, 212.

beneficed Men and your Deemsters before you sitting and your Clarkes, your Knights, Esquires and Yeomen, about you in the third degree; and the worthiest men in your Land to be called in before your Deemsters, if you will ask any thing of them, and to hear the Government of your Land, and your Will; and the Commons to stand without the circle of the Hill, with three Clearkes in their Surplisses. And your Deemsters shall make call in the Coroner of Glenfaba; and he shall call in all the Coroners of Man, and their Yards in their hands, with their weapons upon them, either sword or Axe. And the Moares, that is, to Witt of every Sheading ...”¹

The Tynwald allowed the King to hear the law of the Isle of Man, and formally to express his will. It is probable that the principal functions of the body at this time were judicial and executive rather than legislative. It was later to evolve into the Manx legislature, a very distinctive feature of the Manx constitution. The different components of the Tynwald were as follows².

First, the King, whose position has been discussed above³. There is evidence that, if the King were abroad, governance of the Isle of Man was entrusted to an official. In 1183 the death of Fogolt, Viscount of the Isle of Man during the reign of King Godred II, was recorded⁴. If Tynwald met during such governance, it may be presumed that this officer presided. The Viscount of the Isle of Man was a precursor of the Captain, Governor and Lieutenant-Governor of later periods.

Second, the Barons. At the start of this period the Barons were temporal nobility, and appeared in the political struggles and events of the period. It is uncertain when the shift to ecclesiastical Baronies began, but by 1417 all the Baronies were in spiritual hands. In later periods the sole surviving Baron, the Bishop of Sodor and the Isle of Man, had a voice in the legislature⁵.

Third, the Deemsters. The Deemster, while similar to the Celtic *Briw*, was a Scandinavian institution. The Scandinavian *lagman*, or law-man, proclaimed judicial decisions and stated the law on any points raised. The Deemsters, whose title derived from *domstiorer*, or doom-steerer, carried out the same function. In the absence of written legal records, the Deemsters were repositories of oral customary law, known as breast law⁶.

¹Customary Laws (no.2) 1417 s.1.

²See CUBBON W., Island Heritage, [Douglas] (1952), Chapters 7,9,12; FARRANT R.D., Mann. It's Land Tenure, Constitution, Lords Rent and Deemsters, [Douglas] (1937) Chapter 2.

³See p.106.

⁴Manx Society 22,79.

⁵See p.137.

⁶See p.69.

Fourth, “the worthiest men in the land”. In the Icelandic *Al-þing*, when a difficult point of law arose, some freemen were selected to assist the law-men in their functions. It seems likely that, in the Isle of Man, these freemen were selected on more than an *ad hoc* basis since, during the period of the Kingdom of the Isles, eight were selected from outside the Isle of Man ¹. Little more can be said of the body which later evolved into the Keys ² due to the paucity of contemporary sources.

As well as the constitution, other Scandinavian laws survived into the period of written records. For instance, the system of arbitrary monetary compensation for blood-shed survived in the procedure for blood-wipe ³. There is also evidence that the Scandinavian rulers introduced novel laws, such as that concerning wives' rights over immovable property ⁴.

It can be seen that in 1266 the Kingdom of the Isle of Man was organised on Scandinavian lines, albeit influenced by the earlier Celts, and despite a succession of suzerains appears to have enjoyed considerable autonomy. The laws and customs of the time were sufficiently well-established to survive long after the position of the Isle of Man had changed radically. The coming period was not to be so settled.

The Anglo-Scots Period (1266-1405).

As has been discussed ⁵, in 1266 the Isle of Man was ceded to Scotland. In 1405 the Isle of Man was granted to John Stanley by the King of England ⁶. In the intervening period the Isle of Man was conquered and reconquered by English and Scottish Kings and nobles. The chaos of this time caused, in terms of legal development, something of a dark age. It is possible to outline with some certainty the movements of the Manx crown: but the internal details of Manx laws and affairs are almost entirely undocumented. Nonetheless, it is important to discuss this period briefly, as it included the final entry of the Isle of Man into the dominions of the English Crown.

¹Customary Laws (no.2) 1422 s.28.

²See KINVIG R.H., The Isle of Man. A Social, Cultural and Political History, [Liverpool] (1975), Chapter 5. STENNING E.H., Portrait of the Isle of Man, [Douglas] (1978) Chapter 7. MOORE R.B., "The Roll of the Keys", (1956) I.O.M.N.H.A.S. (P.) 5,47.

³See p.199.

⁴PARR, 106.1-2. The association of this law with Magnus Barefoot, while traditional, is dubious - see A.W. MOORE, 105-6.

⁵See p.107.

⁶See p.112.

Between 1266 and 1333 the Isle of Man was ruled by a succession of Scots and English Kings, and nobles holding their Crown from these Kings ¹. After 1346, and the defeat of the Scots at the Battle of Neville's Cross, the Scots ceased to press their claim to the Isle of Man ². In any case, by this time the Isle of Man was in the hands of the Earl of Salisbury ³.

On the 9th of August 1333 Edward III, who appears to have gained possession of the Isle of Man from the Scots earlier in the year, granted the Isle of Man to its custodian, Sir William de Montacute, later first Earl of Salisbury. The grant, *prima facie*, established de Montacute as an absolute Monarch, as Edward III:

“remitted, surrendered, and ... assigned peaceful possession of all the rights and claims which we have, have had, or in any way could in the Isle of Man ... so that neither we, nor our heirs, nor any other in our name shall be able to exact or dispose of any right or claim in the aforesaid Island” ⁴.

The exact nature of the title of King William de Montacute is discussed elsewhere ⁵.

Upon the death of William I in 1344 his son succeeded him. Certainly, the latter was styled “Lord of the Isle of Man” in 1381, and dealt with it as absolute owner in 1392. In that year William de Montacute II sold the island, “with the crowne”, or regalities, to Sir William le Scroop ⁶. It would thus appear that all the rights vested in the first Earl of Salisbury thus passed to le Scroop.

le Scroop backed Richard II in the struggle for the English throne and, upon the accession of Henry IV in 1399, was executed. Henry IV was then in absolute possession of the Isle of Man, either on the basis of extinction of all adverse claims, and claimants ⁷, or under some more widely recognised legal doctrine ⁸. Henry IV then granted the Isle of Man to Henry de Percy, Earl of Northumberland. But the grant was qualitatively different from that made to the first Earl of Salisbury. It was subject to the service of carrying, on the Coronation day of each English sovereign, the Lancaster Sword ⁹. Thus, after this grant, the Isle of Man was held by a vassal monarch from the English Sovereign. More distinctively, the vassal monarch

¹See ANON, "The Isle of Man and the Anglo-Scottish War, 1296-1328", (1960) 5 J.M.M. 126; MOORE A.W., "The Connexion between Scotland and Man", (1906) Scot.Hist.Rev. 393.

²But see MEGAW B.R.S., "The Scottish Invasion of Man in 1456", (1957) 6 J.M.M. 23.

³On this period, see A.W. MOORE, 181-195.

⁴Manx Society 12,22.

⁵See p.7.

⁶See Manx Society 12,32.

⁷A.W. MOORE, 196.

⁸See p.7.

⁹Manx Society 7,215-9.

was a subject of the English crown who had been granted the Isle of Man conditional to service - not a Manx ruler who had submitted himself to a suzerain for personal benefit, as was the earlier pattern ¹.

It seems probable that between the rebellion of the Percies in 1403, and 1405, the whole title of the Isle of Man vested in the English Sovereign ². In 1405 the Isle of Man was granted to John Stanley for life, and in 1406 to John Stanley and his heirs on terms which were to remain essentially unchanged for more than 350 years ³. The period of the vassal Kings had begun.

The legal heritage of this Anglo-Scots period was small. There is evidence that the Scandinavian legal system suffered under the varied rulers, wars of conquest, and piratical raids of the time. In a declaration of customary law to John II in 1422, by the Deemsters and the Keys, it was noted:

“that there was never 24 Keys in Certainty, since they were first that were called Taxiaki, these were 24 free Houlders, viz. 8 in the Out Isles and 16 in your Land of the Isle of Man, and that was in King Orry's Days; but since they have not been in Certainty” ⁴.

It was also declared that “as to the Writeing of Laws, there was never any written since King Orry's Days, but in the time of Michael Blundell, that we have knowledge of” ⁵. To expand on the latter declaration slightly, in 1417 it was believed that no laws had been written down in the Isle of Man after the transfer of the Isle of Man to the Scots Crown, except by Michael Blundell, who had been Governor, but whose records had not survived to 1417. The same declaration contained evidence that what laws there were had been applied partially ⁶.

More positively, some doctrines of Manx law appear to be of Scots origin, and may have been imported during the period of Scots rule. For instance, the execution of female felons by drowning them in a sack appears to have been copied from an earlier Scots statute, although it survived in the Isle of Man in customary form ⁷.

The Vassal Kings (1405-1765).

¹See p.107.

²A.W. MOORE, 197.

³See p.112.

⁴Customary Laws (no.1) 1422 s.28.

⁵Customary Laws (no.1) 1422 s.29.

⁶Customary Laws (no.1) 1422 s.45.

⁷See p.257.

The Isle of Man was first granted to John Stanley in 1405, for life ¹. In 1406, before the attainder of the Earl of Northumberland, Henry IV granted the Isle of Man to John Stanley, his heirs and assigns, on the service of rendering two falcons on paying homage, and two falcons to all future Kings of England on the day of their Coronation ². Although the most significant rights over the Isle of Man were given up in 1765, this service was carried out, in order to preserve residual rights, until 1821 - George IV being the last British King to receive the two falcons.

The King of the Isle of Man thus held his Crown by virtue of service to the King of England. This suzerainty is also demonstrated by the role of the King of England in disputes over the Manx Crown. An example of this occurred in 1594, when a dispute arose between the heirs general and heirs male as to who should succeed Lord Ferdinando as Lord of the Isle of Man. Pending settlement, the English Crown took possession of the Isle of Man ³. In 1609 the case was decided, by the English courts, in favour of the heirs general, on the basis that the right descended by the common law of England ⁴. The heirs general agreed to an Act of Parliament being passed to extinguish their rights, and a new grant of the Island, on similar terms to the original, was made to the heir male, his wife, and their descendants ⁵. It would thus appear that the suzerain retained rights to determine the identity of the vassal ⁶.

The vassal Kings were active in the political life of England, and had properties other than the Isle of Man. One example will suffice. James, Lord Strange, later the seventh Earl of Derby, was called by the Manx *Yn Stanlagh Mooar*, or the Great Stanley. He was born at Knowsley in 1607, and entered Parliament in 1625. He was knighted in 1626. Lord Strange fought for King Charles I against the Scots rebels in 1640, and at the start of the English Civil War provided 5000 men, and 40,000 pounds sterling to the Royalist cause. In 1643, after involvement in the Civil War, he returned to the Isle of Man and held it for the Royal cause, with excursions to England, until 1651. He was captured in the retreat after the Battle of Worcester, court-martialled for treason and executed ⁷.

The vassal Kingship of the Isle of Man continued until 1765, although Thomas III of the Isle of Man, and his successors, found it more politic to style themselves Lords. The demise of

¹ Manx Society 7,232-4.

² Manx Society 7,235-46.

³ See A.W. MOORE, 228-230.

⁴ Isle of Man Case (1598) 2 And.115; 123 E.R. 575.

⁵ See p.41.

⁶ See p.41.

⁷ A.W. MOORE, 231-264.

the vassal Kings was a sufficiently important event to merit further discussion within this text.

In 1752 there were numerous rumours circulating in the Isle of Man, brought from Whitehaven, that Lord Atholl had sold the Island to the British Customs ¹. By 1764, the Isle of Man had become actively involved in trade with Great Britain. It is at least arguable that this trade was not smuggling *per se*, but it certainly caused a reduction in British customs revenue ². It was sufficiently distressing to lead the British Prime Minister, Grenville, to negotiate:

“for the purchase of the Isle of Man, or of such part of the rights claimed by the [Lord of the Isle of Man] in the said Island, as it shall be found expedient to vest in the Crown, for preventing that pernicious, and illicit trade which is at present carried on between the said Island and other parts of His Majesty's dominions, in violation of the laws, and to the great diminution and detriment of the revenues of the kingdom”.

The negotiations were accompanied by a threat to pursue other means of Revestment if required. Parliament did, in fact, pass an Act radically affecting trade in the Isle of Man, although it did not come into effect until after Revestment.

The Lord of the Isle of Man at this point named the price for sale of regalities, patronages, customs duties, landed property and manorial rights ³. The British Government were interested only in the regalities and customs duties, which were Revested in the Crown by Act of Parliament in 1765 ⁴. The separation of regalities and other rights enjoyed by the Lord in the past caused tension in the Isle of Man, as the holders of the other rights avidly protected them, and the last of these rights was Revested in the English Crown by 1826 ⁵.

During the period before Revestment, the internal constitutional arrangements of the Island became more settled. It is useful to consider the legislature, judiciary, and executive separately, then move on to the substantive law of the period.

The legislature, Tynwald, consisted of the Keys, the Council, and the Lord of the Isle of Man. The Keys were twenty-four appointees of the Lord, who were subject to removal by the Lord either individually or *en masse*. In practice, by 1765 the Keys had developed into a self-

¹See Governor Cochrane to Lord Atholl, 18 November 1752 [M.M.A.].

²See Memorial from Stanford and other Merchants of Whitehaven and Other Towns, 25 February 1709 [P.C. 1/14/19] for an early example of merchantile tensions.

³For a recollection of this by a contemporary, see Commissioners Report, (1792) Examinations, J. Quayle, 26 September 1791; T. Moore, 27 September 1791 [H.O. 99/21].

⁴See p.9.

⁵See, on the tensions caused by this mode of purchase, J. Penington to Penington Snr., 2 April 1764 [Manx Museum, MD 508].

perpetuating oligarchy ¹. The Council were the principal officers of the Lord, who also acted as advisers to the Governor ². The assent of both these bodies was needed to enact a Act of Tynwald. The signature of the Captain or Governor, the official who headed the Insular administration in the absence of the Lord ³, was also required.

The legislature created new laws, generally not based on English models, during this period. Additionally, the older procedure of declaration of customary laws by Deemsters and Keys continued. ⁴

The chief judicial officer of the Isle of Man was the Lord of the Isle of Man. In practice, the Lord was rarely present on the Island, and judicial functions were undertaken by the Governor. There were a large number of courts, with different functions, but in practice the courts were held by the same officers, at the same place, and on the same day ⁵. The Deemsters acted as legal advisers to the Governor, and in some cases the Keys were called upon to assist the Deemsters, or to review the findings of a jury ⁶. It should also be noted that during this period there existed a number of ecclesiastical Baronies. Within the Baronies, judicial functions were exercised in the Baronial Court, albeit under the general supervision of the Lords Officers ⁷.

The executive functions were exercised by the Governor, or when he was absent from the Isle of Man for a prolonged period, the Lieutenant-Governor, and the principal Officers of the Island. The system of administration during this period retained many of the forms of the previous period, but in practice grew closer to the English system of administration.

An Island Dependent (1765-1866).

Between 1765 and 1866 the legal title to the Isle of Man, and the effective control of the government of the Isle of Man, lay with the British Crown. After 1866, although the Crown of the Isle of Man remained vested in the British Sovereign, governmental power began to return to the Isle of Man.

¹See p.136.

²See p.137.

³See p.135.

⁴See p.69.

⁵See p.188.

⁶See p.189.

⁷See p.194.

On the 11th of July, 1765, George III was proclaimed Lord of the Isle of Man, and the Union Jack rose above the Keep of Castle Rushen ¹. At least some of the Manx feared for their ancient legal rights and constitutional practices. Revestment was seen as much more than a mere change in the natural person of the Lord of the Isle of Man ². Some of these sentiments may be found in “A Dialogue at the falls near Snaefield between some peasants, inhabitants of the back settlements of Mona - upon an expected introduction of English laws and taxes. Penn'd as the words were spoken, and translated by Jenkin Mc.Mannanan, a lover of the old establishment” ³. It is unclear whether this document was prompted by the passing of the Act of Parliament to reform revenues ⁴, or by Revestment, although the latter seems more probable to this author. The parties had a low opinion of the Keys and feared that they were

“for loading us with English taxes ...
Compelling us to drudge with crows and axes
In English mines, or serve on board their Gallies
Yet they pretend to make us their fast allies
By joining the Isle of Man to Cumberlands black coast ...”

The dialogue ends on a sombre note, with a call for the Manx to emigrate to America “for Mona's bliss and freedom are no more”.

The principal motive for Revestment was the negative desire to restrain loss from British revenues ⁵. Certainly, the early period of governance by the British administration was singularly devoid of initiatives intended to improve the lot of the Manx:

“there was a period of administrative stagnation and indifferent executive control; there was no money for government and consequently little was effected in the way of essential public works” ⁶.

The situation improved in some ways with the appointment of the Duke of Atholl to the Governorship in 1793, but was not fully resolved until a degree of self-governance was granted to the Isle of Man ⁷.

¹See Minutes of the Council Chamber, 13 June 1765 [P.C. 1/7/153] for details of the take-over.

²See CUBBON W., Island Heritage, [Douglas] (1952) 233-243; KINVIG R.H., The Isle of Man. A Social, Cultural and Political History, [Liverpool] (1975) 109-118; MOORE G.E., "The Effect of the Act of 1765", [1964-6] I.O.M.N.H.A.S. (P.) 7,35.

³Quayle Bridge House Collection no. 148 (1935-7) 3 J.M.M. 118.

⁴See p.113.

⁵It has, however, been argued that Revestment was part of a centralising move by the British Government. See GRINDLEY T., "The Story of the Revestment", [Douglas] (1903).

⁶Kilbrandon Report, Minutes of Evidence 6,19 per Joint Evidence of the Home Office and Tynwald.

⁷As an example of the post-1793 activism see the history of the first Criminal Code at p.161. See generally, A.W. MOORE, 527-546.

Between 1765 and 1866 the power to legislate on financial matters was exercised by the Imperial Parliament rather than Tynwald:

“From 1765 onwards when Tynwald desired to raise revenue internally for insular purposes as, for instance, the care of lunatics, a separate board had to be established and given the power to raise revenue by rate. The Island was, in fact, without an insular revenue, without an annual budget, and without resources for development” ¹.

The reforms of 1866 were the result of fifty years of pressure, but “came about because of the initiative of Governor Loch” ². The Governor and the Home Office came to an agreement that Tynwald, provided it consented to an increase in customs duties, should have limited control over the disposal of surplus revenue. The Governor put this before Tynwald in 1866, stressing that an Act of the Imperial Parliament would be needed to effect the change, and that such increased powers would be granted only if the House of Keys became an elected body. The Keys suggested that the matter should be put to the country but, being pressed to decide, found in favour of the reforms. The Imperial Act was not entirely to the satisfaction of Tynwald, and gave them no more than a share in disposal of surplus revenue. Nonetheless, it is recognised as the beginning of a new period in Manx history - a period of Home Rule ³.

Turning to internal matters, it is necessary to consider first the government of the Isle of Man, and then important developments in the substantive law.

The Manx legislature during this period remained unchanged - Keys, Council, and Lord of the Isle of Man. The Lord of the Isle of Man was now the British Sovereign, however, who in many matters was required to take the advice of his ministers who were themselves advised by civil servants. Accordingly, during this period the enactment of a measure could depend upon the *de facto* consent of the Home Office, the Foreign Office, the Law Officers, the Commissioner of Woods, or the Post Office ⁴. Additionally, for the first time the Imperial Parliament enacted significant legislation affecting the Isle of Man ⁵.

As for the judiciary, Revestment eliminated the Lord from the process - appeals from the insular courts lay directly to the Judicial Committee of the Privy Council. This period also saw the introduction of the High Baliffs, stipendiary magistrates based in the principal towns

¹G.E. MOORE, "The Effect of the Act of 1765", [1964-72] I.O.M.N.H.A.S. (P.) 7,35. See D.G. KERMODE, 28-31.

²RICHARDS J., The Government and Politics of the Isle of Man - a study in Community Politics, [M.M.A.] (1972).

³See further FORSTER R.E., A Study of the Constitutional and Financial Movements in the Isle of Man, 1833-1866, [M.M.A.] (Undated). SEE D.G. KERMODE, 31-35.

⁴See p.14.

⁵See p.49.

of the Isle of Man ¹. Perhaps most notably, this period saw the demise of the declaration of customary law by Deemsters and Keys ², and the elimination of the Keys from trials for capital crimes ³.

Executive functions remained with the Governor and Council, but the aims of the executive, and often details of implementation, were now directed by a sophisticated administration - the British government and civil service. The body primarily responsible for the Isle of Man after 1782 was the Home Office but during this period “the Home Office left the affairs of the Isle of Man very much to the Treasury, only occasionally asserting its authority in connection with Manx legislation” ⁴. The administration of the Isle of Man increasingly followed English patterns.

Home Rule before the Second World War (1866-1939).

Between 1866 and the Second World War the Isle of Man enjoyed a curiously limited degree of autonomy perhaps best described in the contemporary nomenclature of Home Rule. It enjoyed this autonomy within a wide British Empire, many of whose territories enjoyed lesser degrees of self-governance. With the disintegration of the British Empire after the Second World War, the position of the Isle of Man became increasingly unusual and problematic.

As would be expected where an event of global, rather than local, significance has been chosen to mark the end of the period, the division between this period and that following is artificial. Many of the changes of the post-war period were continuations of reforms begun earlier in the century. Nonetheless, the differences between the Isle of Man in, say, 1930 and 1970 are sufficiently strong to merit this division.

After 1866 the Imperial government increasingly sanctioned the transfer of financial and administrative functions to the Manx government ⁵. The Manx government itself underwent a number of changes.

As has been noted, in 1866 the House of Keys became an elected body ¹. After this change, conflicts between the House of Keys and the Council, which had always existed, intensified. The Council consisted solely of Crown appointed officials and:

¹See p.193.

²See p.69.

³See p.191.

⁴D.G. KERMODE, 104.

⁵D.G. KERMODE, 31-39.

“in spite of the fact that each official was locally recruited on the advice of the Lieutenant-Governor, the Council was seen as part and parcel of the colonial apparatus of government”².

In 1911, in the wake of a minor constitutional crisis³, a government committee recommended reform of the Council, in order to give the House of Keys some say in its composition⁴. In 1919 statute provided for four members of the Council to be appointed by the House of Keys, but a majority of members were still appointed by the Crown or the Lieutenant-Governor⁵.

The majority of the Manx Courts were merged into a single High Court of Judicature in 1883, although the principal criminal courts remained distinct⁶. The most important judicial development of this period was the transformation of the Staff of Government into a court of appeal with an extensive jurisdiction, staffed by an English Queen's Counsel and a Manx Deemster.

Turning to the executive, functions came to be divided, unevenly, between the Lieutenant-Governor and Boards of Tynwald. The vast powers of the Lieutenant-Governor of the period can be seen in the view of Attorney General R.B. Moore, writing in 1943:

“in form, the Governor alone is responsible for policy and for government, for the initiation of legislation, the introduction of all financial proposals, both for the imposition of taxation and for the expenditure of revenue.”⁷

The Boards of Tynwald also exercised some executive powers within their particular areas. The Boards were made up of members of Tynwald, who often occupied posts on more than one Board, and were a distinctively Manx institution⁸.

The most important development in Manx criminal law during this period was the predominance of statutes based upon English models, exemplified by the Criminal Code of 1872⁹.

Modern Developments (1939-1996).

¹See p.138.

²D.G. KERMODE, 72.

³D.G. KERMODE, 36-37.

⁴See further H.O. 284/18.

⁵See p.137.

⁶See p.143.

⁷Notes on a Deputation to the Home Secretary on Proposed Reforms of the Constitution of the Isle of Man, [Douglas] (1944) 6.

⁸See further KERMODE D.G., 126-130.

⁹See p.165.

In the wider world, this period saw the decline of the Empire into *de facto* independent former colonies, and the development of the British Commonwealth ¹. The Isle of Man did not take a full part in this development towards independence, and remained closely tied to the United Kingdom. For at least part of this period, the United Kingdom government could be perceived as treating the Isle of Man differently from more recent Imperial acquisitions - neatly summed up by the submission of Tynwald to the Kilbrandon Commission:

“It seemed, therefore, that the United Kingdom governments policy differed according to whether it was the Home Office or the Foreign and Commonwealth Office which held the responsibility for the future of a dependency. For those remote in distance and aloof in sentiment, one policy, a policy of self-determination and self-government; but for the near and the steadfastly loyal, another policy, a policy of denial.”²

Although the Isle of Man remained far from independent, considerable authority was transferred to the Manx authorities throughout this period, the insular authorities themselves becoming less dominated by Home Office appointees.

Considering the legislature first, in 1961 the official majority in the Council was reduced at the same time as the Council's power to veto Bills was curtailed ³. After 1961 the number of official members fell, and the Council became dominated by appointees of the House of Keys. The role of the Lieutenant-Governor in legislation was greatly reduced, although he was empowered to assent to some Acts of Tynwald on behalf of the Sovereign ⁴.

The most radical change, however, was in the executive. In 1946 the Lieutenant-Governor was instructed to form an Executive Council of seven members, appointed upon the recommendation of Tynwald ⁵. The Executive Council was placed on a statutory basis, and reconstituted, in 1961 and 1968 ⁶, and has been described as “the Manx equivalent of the British Cabinet” ⁷. At the same time as the Executive Council gained stature, the Lieutenant-Governor also lost some functions to an increasing number of Boards of Tynwald ⁸. The transfer of executive power from the Lieutenant-Governor to local officials continued with

¹See HUGHES H., National Sovereignty and Judicial Autonomy in the Commonwealth of Nations, [London] (1931); KEETON G.W., The British Commonwealth: The Development of its Laws and Constitutions, [London] (1955); WHEARE K.C., The Constitutional Structure of the Commonwealth, [London] (1960).

²Kilbrandon Report, Minutes of Evidence 6,28 at paragraph 8. For the dark side of this view see 6,93.

³See p.135.

⁴See p.14.

⁵D.G. KERMODE, 47.

⁶See p.15.

⁷D.H. KERMODE, 93-98.

⁸D.G. KERMODE, 126-138.

the creation of an entirely insular executive led by a Chief Minister, and the relegation of the Lieutenant-Governor to a more formal and residual role ¹.

Given the amount of constitutional change which occurred during this period, particularly in the last decade, it should not be taken as indicative of any change in policy that the rate of change has begun to slow. Rather, the most important elements of constitutional reform have been secured, and only relatively minor issues, such as the appointment of the Attorney General, remain to be resolved ²

Conclusions.

By 1266 the Isle of Man had a developed legal system on the Scandinavian model. The Anglo-Scots period was “a dismal period of Manx history, during which the unfortunate island changed its rulers so often that they could have taken but little interest in it” ³. Insofar as the Manx constitution and laws are concerned, the period appears important more for the damage done to the Scandinavian heritage than any positive developments. But towards the end of this period a key element of the Manx constitution, a strong English sovereignty over a vassal monarch, was established.

The reign of the Stanleys saw a relatively stable system of government develop under a monarch tied legally and politically to the English crown. While a subject of the English Crown, the Lord was sufficiently powerful to enjoy his regalities undisturbed. It was not until 1765 that his position became untenable, and the period of the vassal monarchs came to an end.

The upheaval of Revestment was followed by a period of legal stagnation, followed by increased activism, reforming the law on the English model. During the period between 1765 and 1866 the Imperial authorities exercised close control over the decision making of the Manx government. After 1866 the Isle of Man increased control over its internal affairs and laws.

The Isle of Man was exposed to a rich diversity of legal and political traditions but, during the period in which the law became a coherent system administered largely by the State, it was exposed predominantly to the influence of the English jurisdiction.

¹See p.139.

² See COUNCIL OF MINISTERS, Third Interim Report on Future Constitutional Objectives, [Douglas] (1995).

³A.W. MOORE, 198.

The English sovereign also strengthened his hold over the King of the Isle of Man, eventually reducing the latter to vassalage, and finally subsuming him entirely. The self-governance of the Isle of Man suffered a similar decline, regaining and democratising the strength of the pre-Revestment Lords only by transferring power from the Sovereign-Lord to local organs of government.

Chapter Seven: External Relations of the Isle of Man.

This section briefly considers the legal relationships between the Isle of Man and other bodies. The most significant relationship for the Isle of Man is that with the United Kingdom. With the increasing importance of the European Union in the region, the relationship of the Island with that organisation must also be considered. Finally, the relationship between the Isle of Man and the European Convention on Human Rights will be discussed, in part because it illustrates the general, extra-legal, importance of international obligations for the Isle of Man.

The Isle of Man and the United Kingdom.

Many elements of the relationship between the United Kingdom and the Isle of Man do not have a strong juristic basis. This section will not discuss the political dimension of the relationship, except to note that:

“The general objective for which Tynwald strives is to promote and continue the evolution of the constitutional relationship between the Isle of Man and the United Kingdom towards ‘more complete self-government’ in accordance with the declared and accepted policy of the United Kingdom for the self-determination of the peoples of dependent territories. This objective thus includes not only the right and principle of self-determination, but also, in application of them, assured autonomy in respect of the Island’s internal affairs.”¹

This aim was endorsed by the Constitutional and External Relations Committee in 1993, which also emphasised that independence was not an aim to be pursued at the moment. Rather, the Manx government aims

“To promote and continue the evolution of the constitutional relationship between the Isle of Man and the United Kingdom towards more complete self-government and to ensure appropriate recognition of the Island’s interests internationally”¹

Instead, this section will consider the purely legal links between the Isle of Man and the United Kingdom.

The Lord of Man and the Sovereign of the United Kingdom.

The fundamental core of the relationship between the United Kingdom and the Isle of Man lies in the relationship between these two constitutional corporations. Before the Isle of Man entered the dominions of the Crown, the organs of government of England had no authority over the Isle of Man. When the Lord of Man was, *ipso facto*, a vassal of the British Sovereign, the organs of government of Britain retained certain powers over the Isle of Man,

¹ Resolution of Tynwald in July 1981.

but more immediate authority lay with the Lord. Since Revestment the Lord of Man and the British Sovereign have been the same natural person. Thus, it may be theoretically correct to view the relationship between the United Kingdom and the Island as that of equals sharing the same Head of State.

The Isle of Man and the United Kingdom Government.

Practically, however, the United Kingdom dominates the relationship. With the decline in the constitutional independence of the Sovereign, there now exists a convention that, in the exercise of her Sovereign powers, she will follow the advice of her Ministers of the United Kingdom Government. There is no such convention that, when exercising powers vested in her natural person as Lord of Man, she should follow the advice of her Ministers in the Isle of Man. Rather, she is again required to follow the advice of her United Kingdom ministers, of whom the most important is the Home Secretary, who is the Minister primarily responsible for Manx affairs.

Most of the legal consequences of this position have already been discussed in the previous Part of this text. In particular, the authority of Parliament and the British Executive has already been dealt with. It is worth noting, however, that a number of other powers reside in the United Kingdom government by virtue of their control of the Crown, regardless of any special statutory powers granted by Act of Tynwald or Act of Parliament. Firstly, the Lieutenant-Governor is a servant of the Crown, and can be required to exercise his remaining powers as the Home Secretary demands. Secondly, some of the most important officials of the Manx government are appointed by the Crown, rather than by Tynwald. Thus, the Lieutenant-Governor, First and Second Deemsters, and Attorney General are all appointed by the Crown. In practice, the Home Secretary consults with the Manx government, either directly or through the Lieutenant-Governor, before making an appointment. Thirdly, the bundle of powers, rights and characteristics described as the Royal Prerogative reside in the Crown. Fourthly, the Crown retains the power to control the international affairs of the Island, which it regards as a non-metropolitan part of its territory.

The Isle of Man and the European Communities. ²

¹ Isle of Man Government Policy Report 1993.

² Strictly speaking, the Island has no special relationship with the European Union as such, but only with the European Communities, which constitute one of the 'pillars' upon which the EU is based.

The relationship between the United Kingdom and the European Union has been a complicated one, but that between the Isle of Man and the European Communities even more so ¹. In 1970, while the United Kingdom was considering entry to the European Economic Community, Tynwald resolved that entry to the EEC without special terms for the Island “could be disastrous to the economic, social, and cultural development of the Manx people” ². After a period of negotiation, the United Kingdom secured a special relationship with the community for the Isle of Man, and other dependencies in a similar position. This is contained in Protocol 3 to the Act of Accession, which is enabled by Article 227 of the Treaty of Rome.

In regard to the effect of European Community law in the Isle of Man, once it is determined that a particular provision comes within the scope of Protocol 3, general principles derived from English and European Community jurisprudence will govern its application ³. The more difficult issue is what parts of European Community law are covered by Protocol 3. A regular list of European Community legal instruments which may apply to the Island is distributed by the European Relations Division of the Island, but this list is in no sense definitive, and the selection of materials for this list can prove controversial.

Protocol 3 provides as follows:

“Article 1.

1. The Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom. In particular, customs duties and charges having equivalent effect between these territories and the Community, as originally constituted and between those territories and the new Member States, shall be progressively reduced in accordance with the timetable laid down in Article 32 and 26 of the Act of Accession. The Common Customs Tariff and the ECSC unified tariff shall be progressively applied in accordance with the timetable laid down in Articles 39 and 59 of the Act of Accession, and account being taken of Articles 109, 110 and 119 of that Act.

2. In respect of agricultural products and products processed therefrom which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom shall be applied to third countries.

¹ I am indebted to the External Relations Division of Government Offices for guiding me through this difficult area, and giving me access to their material. This is the only section in this text where any access arrangements were made.

² See M. Solly, Government and Law in the Isle of Man, (1994) 150.

³ See European Communities (Isle of Man) Act 1973; European Communities (Greek Accession) Act 1981; European Communities (Spanish and Portuguese Accession) Act 1985; European Communities (Amendment) Act 1988.

Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition in trade in these produces shall also be applicable.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the conditions under which the provisions referred to in the preceding subparagraphs shall be applicable to these territories.

Article 2.

The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services.

Article 3.

The provisions of the Euratom Treaty applicable to persons or undertakings within the meaning of Article 196 of that Treaty shall apply to those persons or undertakings when they are established in the aforementioned territories.

Article 4.

The authorities of these territories shall apply the same treatment to all natural and legal persons of the Community.

Article 5.

If, during the application of the arrangements defined in this Protocol, difficulties appear on either side in relations between the Community and these territories, the Commission shall without delay propose to the Council such safeguard measures as it believes necessary, specifying their terms and conditions of application.

The Council shall act by a qualified majority within one month.

Article 6.

In this Protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and Colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalised or registered in the Island in question; but such a person shall not for this purpose be regarded as a Channel Islander or Manxman if he, a parent or a grandparent was born, adopted or naturalised or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.

The administrative arrangements necessary to identify these persons will be notified to the Commission.”

Under the Protocol, the Island is part of the customs union of the EC. It is also, in an originally more comprehensive, customs union with the United Kingdom, which had the effect of causing the Island to apply EC rules on excise revenues and VAT, which were not included in the Protocol. The Island is now treated as part of the EC for VAT purposes ¹ Article 1 also prevents measures aimed at protecting local industries from competition from elsewhere in the EC. At one point it was thought that this prohibition did not apply to trade between the Island and the UK, although it definitely applied to trade with other EC members ². The better view, given the non-discrimination requirement in Article 4, is that the Article includes trade with the United Kingdom. It seems likely, however, that Article 1(1) reference to Community rules on quantitative restrictions is limited to the provisions under Article 30

¹ Council Directive, 16 December 1991 (91/680/EEC).

² *Ball v Nicholson (Isle of Man) Limited* [1987-9] Manx L.R. 292.

of the Treaty of Rome ¹ or, at the very broadest, measures very closely associated with freedom of movement of goods.

Agricultural products including fisheries are dealt with more specifically under the Protocol, being one of the chief Manx concerns before Accession. Regulation 706/73, enacted by the Council under its powers under Article 1(2), details the application of EC rules on agricultural products. The application of the Protocol to fishing matters is less straightforward, although it is clear that fish and fish products are treated as ‘agricultural products’. The Commission has argued that Protocol 3 includes fishing conservation measures, as being too closely bound up with free trade to sever ². It may be better to argue that catching fish does not constitute part of the trade in fish, and that some sort of severance can, therefore, be justified. The practical importance of this issue is minor, as since 1991 the Island has agreed with the United Kingdom to keep Manx fishery rules broadly in line with those of United Kingdom waters.

More straightforward than Article 1 is Article 2, which excludes Manxmen from Community provisions relating to the free movement of persons and services. Although of some theoretical importance to the minority of the Island population coming within the definition of Article 6 ³, this Article is most important for its exclusion of Community rules on freedom of movement from the Island. Thus, the Island has been able to maintain a system of work-permits for UK and other EC nationals, and could introduce a system of residence controls if desired.

Article 4 of the Protocol provides a guarantee of non-discrimination and, unsurprisingly for such a fundamental guarantee, has produced important case law. In *DHSS v Barr and Montrose Limited* ⁴ the defendants were prosecuted for violation of the work permit regulations, which they argued were void as contrary to Article 4. The Deputy High Baliff referred the points raised to the European Court of Justice under Article 177 - in itself

¹ Mr. Hoon’s question to the European Commission, no.99 H546/88).

² EC Commission v UK [1978-80] Manx L.R. 350.

³ Article 6 should be read as referring to “any British citizen”, as opposed to “citizen of the United Kingdom and Colonies” following changes in United Kingdom nationality and immigration law after the Protocol was agreed.

⁴ DHSS v Barr and Montrose Limited [1990-2] Manx L.R. 243.

clarifying that such a reference was possible by a Manx court. The most important part of the decision of the European Court was that, while the principle of equal treatment applied in all situations governed by Community law, it cannot be used as an indirect means of applying provisions of Community law beyond those covered in earlier Articles. Thus, Article 4 does not allow unlimited application of EC law to every instance of *prima facie* discriminatory action.

Finally, the derogation provisions in Article 5 have been invoked in order to allow the Manx government to retain local laws. By a decision of the Council ¹ the United Kingdom was permitted to authorise the Manx government to apply a system of import licenses to products of the sheep meat, beef and veal industries, which would otherwise have been prohibited as a quantitative restriction and contrary to free movement in agricultural products.

Turning from Protocol 3 to the administrative aspects of the relationship, the External Relations Division is the administrative body with primary responsibility for considering whether a given piece of EC legislation applies under the Protocol. For obvious legal reasons, the Division does not purport to give definitive guidance on this issue, even within government, and encourages those who may be affected by legislation to seek independent legal advice. Nonetheless, the methods they use in considering EC legislation are of general value.

The Division takes as a first principle the purpose of the Protocol, which is to create a *limited* relationship with the European Community. It is guided primarily by administrative precedents e.g. whether prior legislation on a topic was considered to be applicable. Accordingly, internal evidence within the legislation is vital. All legislation must state its legal basis, and much refers to prior legislation. In difficult cases, especially where a decision on an earlier piece of legislation is later doubted, the Attorney General can be consulted for an opinion, which is regarded as of especial precedential value ².

¹ Decision of the Council, 82/530/EEC.

² The Channel Islands are bound by the same provisions of Protocol 3, and decisions by officials in those jurisdictions are, presumably, of some value in approaching these issues. There is no formal connection between the administrators of the territories to share opinions as to the application of European Community legislation, although the level of cooperation on external issues is generally high.

The relatively unstructured approach to application of the Protocol by the primary body responsible within the Manx government illustrates how loosely the Protocol has been drafted. Whatever ambiguities remain within the Protocol, however, it is fair to say that the Island has a very favourable position in the European region, and it is difficult to envisage any change in Protocol 3, except perhaps as part of broader European constitutional reform, improving its position.

Protocol 3 does not describe the full extent of European Community influence upon Manx law. The Division sends inapplicable legislation to Government Departments in case they consider it worth adopting, and there are pragmatic reasons for wishing to adhere to prevalent European norms in a number of areas, for instance beach cleanliness. An administrative procedure for adopting European Community legislation has been developed by the Attorney General's office.

The impact of the Island on European legislation, on the other hand, is predictably small. The Division has good liason with the Home Office and organs of the European Union, but uses this mainly for advance information of developments. Comments on draft legislation are possible, both via the Division and via any other links a particular Department may have with a similar organ in the United Kingdom, but are uncommon.

The Isle of Man and the European Convention on Human Rights.

While the European Community is a special example of the power of the United Kingdom to enter into international agreements, the European Convention on Human Rights provides a more general example of the treaty making power of the Crown, along with some special points of constitutional interest.

The Isle of Man in International Law.

The status of international law in the Manx legal system has been discussed elsewhere ¹. It remains to consider the extent to which international treaties bind the authorities in the Island, and to consider how these treaties are formed.

The Island is not an international person, and lacks the legal capacity to enter into international agreements. Instead, the United Kingdom Crown is responsible for its international relations and, as Horner argues, it may be that the Island is best categorised as a

¹ See p.98.

part of the territory of the United Kingdom, albeit one with special internal arrangements ¹. Whether this is the better view or not, the authority of the United Kingdom Crown to enter into international obligations extending over the Island raises the key issue - when do treaties so extend?

In 1950 the Foreign Office informed all foreign governments and international organisations of the application to the Island of any treaty to which the United Kingdom became a party to. The Memorandum stated that previously the Island had been regarded as included unless the contrary was expressly stated in the treaty itself. It was thought more consistent with the status of the Island to regard it as not forming part of the United Kingdom for international purposes. Accordingly, future treaties would not include the Island “by reason only of the fact that it applies to the United Kingdom and any signature, ratification, acceptance or accession on behalf of the United Kingdom will not extend to the Islands unless they are expressly included” ². The Island would remain, unless the contrary was expressly stated in the treaty in question, a territory for whom the United Kingdom Government was responsible. Treaties already in existence were not affected.

For the rest of the decade the United Kingdom Government typically negotiated an express clause within treaties dealing with their application to territories for whose international relations it was responsible. During the 1960s, however, it became increasingly difficult to secure such a clause as the international community, especially that part which had recently been colonies of a foreign power, grew increasingly wary of them. The extent to which the earlier Memorandum excluded the Island from treaties in the absence of any territorial clause is unclear, but it seems probable that the Memorandum would generally have no effect ³. Rather:

“that the United Kingdom’s acceptance of agreements containing no indication of limited territorial application, binds all the United Kingdom’s dependent territories, including the Channel Islands and the Isle of Man” ⁴

¹ HORNER S.A., The Isle of Man and the Channel Islands: A Study of their Status in Constitutional, International and European Law, [Unpublished] (1984) 80-90.

² For the text of the Memorandum, see SOLLY M., Government and Law in the Isle of Man, [Castletown] (1994).

³ See HORNER, op.cit., 60-62.

⁴ Home Office Letter of 30 December 1966, quoted in HORNER, op.cit., 62.

In 1993 a more comprehensive Memorandum on the issue was released by the Foreign and Commonwealth Office ¹. It appears from this Memorandum that that Office views the Island as a non-metropolitan territory of the United Kingdom and, therefore, in the light of the *Vienna Convention on The Law of Treaties art. 29*, covered by any treaty entered into by the United Kingdom unless a different intention appears from the treaty or is otherwise established. The appearance of a different intention is relatively straightforward, but it should be noted that “otherwise established” can include the actions of the State at ratification or accession, or in some cases later. Additionally, the United Kingdom Government can generally make a reservation at the time of signing or ratifying the treaty limiting the territorial application of the treaty, although some treaties do not permit such reservations.

It would seem therefore that the drafting of particular treaties is the determinant for how far that treaty applies to the Island, with the presumption being that the Island is to be included. The input of the Manx government into drafting the terms on which the United Kingdom Government will agree to a treaty are, therefore, vital.

In the same Memorandum the Foreign and Commonwealth Office describe, in relation to European treaties, a standard operating procedure according to which the Island is to be consulted at an early stage about any treaty which could apply to the Island. These consultations are to ascertain whether the Island has any particular considerations which need to be taken into account, and whether the Island wishes the treaty to apply to it. The Island views may result in a reservation or other territorial statement but, as the Chief Minister has noted, it is “not strictly correct to suggest the Isle of Man assents to international agreements. What we do is indicate a preference”²

Tyrer v United Kingdom under the European Convention on Human Rights.

Perhaps the best known conflict between the Insular authorities and international law arose in relation to the European Convention on Human Rights ³. The European Convention established a system of regional human rights protection between states which, at the time of inception, shared relatively homogenous values and traditions. Since 1989 the membership and diversity of Convention parties has increased, but it remains fair to say that the

¹ See (1993) 21 Manx L.B..

² (1990) 16 Manx L.B. 19.

³ But see also HORNER, op.cit., 63-66. on the Broadcasting Disputes.

Convention is one of the most important international instruments binding on European states. As well as covering a range of fundamental rights, the Convention includes provision for enforcement of those rights through the right of individual application ¹.

The United Kingdom's ratification of the Convention, acceptance of the compulsory jurisdiction of the Court, and the later acceptance of the right of individual application all expressly included the Island. Although arguably not a part of the metropolitan territory of the United Kingdom, the rights and obligations of the Convention could be extended to such dependencies under Article 63.

In *Tyrer v United Kingdom* ² the applicant had been sentenced to corporal punishment by a Manx court under a Manx statute. He queried the validity of this under the Convention, and the United Kingdom government, with its responsibility for Manx international relationships, was brought before the European Court of Human Rights to defend the case. The Court held that judicial birching of juveniles was a violation of Article 3 of the European Convention on Human Rights. It is particularly worth noting that an attempt was made to gain recognition for the Islands special status. Under Article 63(3), where the Convention extended to dependencies, "the provisions of [the] Convention shall be applied in such territories with due regard ... to local requirements". It was suggested that Manx requirements justified an application allowing the birching of Tyrer. This argument failed, perhaps because of the rigour of the obligation under Article 3, but the judgment of the Court makes it doubtful whether Article 63(3) will ever be applied to differentiate between the application of the Convention in the Island and the United Kingdom:

"The system established by Article 63 was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention" ³

At this point, a number of options were open to the Manx and British governments. The United Kingdom could have decided that it no longer wished to be a contracting party to the European Convention on Human Rights, and effectively departed from regional human rights

¹ For an excellent English language discussion of the Convention see HARRIS D.J. et al, Law of the European Convention on Human Rights [London] (1995).

² *Tyrer v United Kingdom* [1978-80] Manx L.R. 103.

³ *ibid*, para. 38.

norms. Parliament, well within the conventional restraints on its legislative coordinancy, could have repealed the Act of Tynwald itself, regardless of the wishes of Tynwald. Tynwald could have repealed the offending Act itself. None of these routes were taken.

Instead, the British and Manx authorities took two steps to prevent a reoccurrence of the *Tyrer* case. The first - and perhaps most offensive - was the failure to renew the right of individual application for the inhabitants of the Isle of Man in 1981. The people of the Isle of Man, unlike those of the United Kingdom, were not to be allowed to bring any violations of the Convention to the attention of the Commission.

Secondly, the British government circulated a copy of the ruling in *Tyrer* to all members of the Manx judiciary who might find themselves in a position to pass a sentence of corporal punishment. The arrangement was described by the Attorney General as:

“an informal pact with the Island. The United Kingdom would take no action to force the Island to change the law, provided that the right to impose sentence of judicial corporal punishment was not in fact exercised.”¹

The constitutional propriety of an informal agreement between the United Kingdom executive and the Manx legislature as to the appropriate exercise of the judicial power of sentencing is open to question, even in the context of Manx separation of powers, but it appears to have prevented any further sentences of birching for some time.

In the later case of *O’Callaghan v Teare*², however, a youth was sentenced to be birched. He appealed against the sentence to the Staff of Government, which quashed the sentence. The principal judge was very careful to show that birching remained a valid sentence in Manx law, albeit one which was not to be selected where an equally appropriate sentence could be imposed which would not violate the United Kingdom’s international obligations³.

It seems clear from *O’Callaghan v Teare* that the United Kingdom remained in violation of Article 3 of the Convention. An individual convicted of a range of offences was instantly exposed to the risk of birching. It would seem from the jurisprudence of the Court and

¹ Attorney General T.W. Cain, “Address to the Isle of Man Magistrate’s Association”, (1981) 20 Manx L.B. 100.

² *O’Callaghan v Teare* [1981-3] Manx L.R. 103, approved *Sallis v R* [1987-9] Manx L.R. 329. See GALE W.S., “*Teare v O’Callaghan*: The Use of The European Convention on Human Rights as an Aid to Interpretation”, (1983-4) 20 Manx L.B. 119.

³ See Peel (1971) 1 NSWLR 247 for a loosely analogous view from the New South Wales Court of Appeal.

Commission that such an individual could, if the right had existed for those in the Isle of Man, have made an individual application with a good chance of success ¹.

Eventually, in 1993, as part of a programme of law reform intended to bring Manx law into line with European human rights norms which included liberalisation of the restrictions on male homosexual acts (another reason for withholding the right of individual application), Tynwald effectively abolished corporal punishment ². Before the Bill received Assent the Manx government, with its laws ready for European inspection, indicated that it wished the right of individual application to be returned ³. The British government acceded to the request, and the right was restored on June 3, 1993.

The relationship between the Island and the European Convention has been an interesting one, not least for the light it sheds on the conventional relationship between the Island and the United Kingdom. It also shows the relative sensitivity with which the United Kingdom can act when faced with a conflict between Manx self-government and international obligations, even when those obligations are as high profile as the fundamental guarantees of the Convention. It must be recognised, however, that the structure of the Convention allowed a certain degree of flexibility which cannot be guaranteed in all international agreements the United Kingdom is party to.

¹ HARRIS D.J., op.cit., 30-1.

² Criminal Justice (Penalties etc.) Act 1993. Note that adoption of a general Bill of Rights to ensure compliance was rejected - Report of the Select Committee of Tynwald on a Bill of Rights, [Douglas] (1994).

³ See on this DOYLE D.C., "European Convention on Human Rights Revisited", (1993) 20 Manx L.B. 110.

Chapter Eight: Separation of Powers - The Legislature and Executive.

The doctrine of separation of powers is imperfectly implemented in the United Kingdom, and even less so in the Isle of Man. Nonetheless, there is some merit in discussing the principal governmental bodies in the Isle of Man in this way. Firstly, it provides for relatively easy discussion in a format often followed by English law textbooks. Secondly, the functions and composition of the principal three bodies are sufficiently different to justify this form of division. Thirdly, although it is unlikely to ever be completely achieved in such a small jurisdiction, the development of some degree of separation of powers is one of the most obvious constitutional developments of this century, and may be set to continue.

Any discussion of separation of powers in the Isle of Man should deal with the Lieutenant-Governor separately. This chapter also considers the closely entwined legislature and executive of the Island. The following chapter discusses the Manx judiciary and subjects ancillary to them, such as the court structure and the legal profession.

The Lieutenant-Governor.

As we discussed earlier ¹, the Governor, Lieutenant-Governor, or Captain, of the Isle of Man was a dominant constitutional figure for much of Manx history - especially when the Lord of Man was an absentee sovereign. For a considerable period, the Governor was the only judge in the superior Manx courts; the head of executive government; and a prominent member of the legislature, with power to control the other insular elements of the legislature.

The most important role of the modern Lieutenant-Governor is to act as nominal head of the Manx government, and personal representative of the British Sovereign. The broader authority has generally been transferred to more purely insular offices or bodies, but the Governor retains some specific statutory roles in relation to *inter alia* appointments, police matters, immigration, passports, and insular Departments ². The demise in importance of the Lieutenant-Governor can be seen, not only as the result of a continuous campaign for reform by insular actors ³, but as an example of growing separation of powers within the Manx constitution.

¹ See p.105.

² For a fuller discussion, See SOLLY M., Government and Law in the Isle of Man, (1994) 104-5.

³ See, from a wide range, First Interim Report of the Select Committee of Tynwald on Constitutional Issues (1979) 5.1-5.3; Second Interim Report of the Select Committee of Tynwald on Constitutional Issues (1981).

By customary law the Lieutenant-Governor held his office during pleasure although, during the nineteenth century, such appointments were extremely long. After the M'Donnell Committee report in 1911, seven year appointments were introduced, reduced to five years after 1974, although both limits were mere convention ¹. Lieutenant-Governors were always imported from outside the Island and were, this century, “able and experienced administrators, having received their training in either the colonial service or the armed forces” ². In 1993 the Manx government reasserted its desire that the Island’s wishes and interests be fully taken into account when appointing a Lieutenant-Governor ³

***The Legislature* ⁴.**

Tynwald.

Within the Manx constitution, the legislature is the Tynwald, sometimes referred to as Tynwald Court. Tynwald consists of the Sovereign, the House of Keys, and the Legislative Council. It is normally presided over by the President of Tynwald, a member of the Legislative Council elected by the members of Tynwald ⁵, except on the ceremonial pageant of Tynwald Day, when that role is taken by the Lieutenant-Governor or, exceptionally, the Sovereign or a member of the Royal Family acting under letters patent.

No Bill may proceed to Royal Assent unless it has been signed by the President of Tynwald, and a majority of each of the two branches - the House of Keys and the Legislative Council. As we have noted, this is not a mere formality ⁶. The most important part of the legislative process is, however, carried out in the two branches, of which the House of Keys is much the most important. The branches are discussed below.

Nonetheless, Tynwald carries out a number of important constitutional duties, beyond the creation of new primary legislation. Firstly, Tynwald makes policy recommendations, and provides a forum for discussion of policy. Secondly, the Manx executive bodies are responsible to Tynwald. Thirdly, Tynwald is responsible for ratifying some subordinate legislation and making certain appointments, such as that of Chief Minister. Fourthly, levying of taxes and supply of finances generally require a resolution of Tynwald, unless statute provides to the contrary. Finally, Tynwald is responsible for receiving and considering

¹D.G. KERMODE, 70-2.

²D.G. KERMODE, 71.

³ Second Interim Report on Future Constitutional Objectives : A Report by the Council of Ministers (1993).

⁴ For very much greater detail, see Solly, op.cit., 213-280.

⁵See p.135

⁶The Manx legislative process is discussed elsewhere - see p.14.

petitions and memorials, in particular, any petitions for redress of grievance presented at the ceremonial Tynwald day.

One procedural point is of some interest. When a vote is taken all members entitled to vote must do so. If the Legislative Council is tied, then the President, who normally sits in that branch, is required to vote so as to bring it in line with the House of Keys. If a vote is passed by the House of Keys, but not the Legislative Council, mechanisms exist to bring it before Tynwald again and, in effect, allow a sufficiently united House of Keys to over-rule the objections of the Legislative Council.

In conclusion, Tynwald *per se* is of relatively minor importance in the legislative process - the majority of debate over, and determination of the fate of, legislation is much more likely to have been decided in the branches. It is of very much greater importance in exercising roles which, under a strict separation of powers, might be considered inappropriate for the legislature.

The House of Keys.

The history of the Keys, later the House of Keys, has been touched on elsewhere ¹. It is worth noting, however, that at Revestment the Keys consisted of twenty-four men who, *de jure*, were appointed by the Lord of Man and subject to arbitrary removal, individually or *en masse*. In practice, their position was firmer than this. By Revestment the practice was for the Keys themselves to nominate two candidates for a vacant seat. The Lord then choose one of these two to take the seat, normally the first named ². Additionally, while the Lord exercised his power of removal as late as 1734 ³, by Revestment it was the practice for each Key to hold office for life, unless his resignation was accepted, he was expelled from the Keys, or he accepted a seat in the Council ⁴. Thus, the Keys were *de jure* a body of Crown appointees, but *de facto* a self-perpetuating oligarchy - “a close corporation [with] membership largely confined to a few leading families” ⁵. In 1866, as part of a broader scheme of constitutional

¹ See p.105.

²See Re Keys (1581) Q.P.; Re Callow (1800) L.S.; Re Keys (1803) L.S. where the second candidate was selected.

³See A.W. MOORE, 669 and 816.

⁴MOORE A.W., 789. See, in more detail, the unnamed, undated manuscript of TAUBMAN J., a M.H.K. for 40 years [M.M.A.].

⁵MOORE R.B., "The Roll of the Keys", (1956) I.O.M.N.H.A.S. (P.) 5,47; Lutton to Lieutenant-Governor Hope, 12 November 1845 [Letterbooks 5,62]; Lieutenant-Governor Hope to Lutton, 30 December 1845 [Letterbooks 5,64]; Grey to Lieutenant-Governor Hope, 19 January 1847 [Letterbooks 5,176]; Lieutenant-Governor Hope to Grey, 26 January 1847 [Letterbooks 5,268]; Lieutenant-Governor Hope to House of Keys, 2 February 1847 [Letterbooks 5,273].

reform ¹, the House of Keys became a democratically elected body, no longer subject to removal by the Crown ².

Today the House of Keys is composed of twenty-four elected Members (MHKs), who represent the Island's fifteen town and sheading constituencies. In contrast to the United Kingdom, the majority of members are elected as independents, rather than representatives of a political party. Another important difference is the procedure by which more than one member is elected from a single constituency, which has led to the Island adopting a form of proportional representation based on the single transferrable vote.

The most important function of the House of Keys is the consideration of insular legislation, which is generally initiated in this Branch. Additionally, Members may table questions relating to public affairs, or request the House to consider a declaratory motion. Finally, as noted below, the House of Keys is responsible for appointing the majority of members of the Legislative Council.

The MHKs are presided over by their Speaker, who is elected from the number. The Speaker may vote in the House, and has a casting vote. More interestingly, he is entitled to abstain. Normal members of the House are not only required to attend sittings of the House unless they have a leave of absence, but are required to vote, rather than being permitted to abstain.

The Council.

The exact membership of the Council, later the Legislative Council, fluctuated considerably after Revestment ³. By customary law the Council consisted of the Lieutenant-Governor ⁴, the principal officers of the Isle of Man who were all Crown appointees, and the Ecclesiastical Barons and lesser ecclesiastical officers ⁵. The key point is that all the members of the Council were appointed by, and generally subject to removal by, the Crown ⁶. At the turn of the century, membership had stabilised as the Lieutenant-Governor, the Bishop of Sodor and Man, the Clerk of the Rolls, both Deemsters, the Attorney General, the

¹See p.116.

²See D.G. KERMODE, 79-93 for details. Now largely governed by Representation of the People Act 1995.

³See generally, VAUKINS J., The Manx Struggle for Reform, [M.M.A.] (1984).

⁴Whose role and voting powers were unclear - see P.R.O. - H.O. 45/13797/520373.

⁵See GELL J., The Constitution of the Isle of Man, [London] (1881); M'Donnell Report, (1911) 9(2).

⁶cf. The brief period after Revestment when appointment of the Bishop lay with the Duke of Atholl as one of his residual rights. See Kilbrandon Report, (1973) Minutes of Evidence 6,11 per the Home Office and Foreign and Commonwealth Office; VAUKINS J., op.cit., (1984) 64; D.G. KERMODE, 72.

Receiver, and the Archdeacon ¹. After 1919, however, the *ex officio* members of the Council were replaced with members appointed by the House of Keys ² until only the Bishop and the Attorney General remained members, and only the former retained a vote ³. Thus, during the twentieth century the Council changed from a body composed entirely of *ex officio* Crown appointees, to one dominated by appointees of the House of Keys.

Today the Legislative Council consists of the President of Tynwald, whose election has been discussed above; the Lord Bishop of Sodor and Man, who sits by virtue of his position in the Church, but is excluded from sitting in the House of Lords thereby; the Attorney General, who no longer has any vote in either Council or Tynwald, but may contribute to discussions; and eight members appointed by the House of Keys. The Keys appoint these members in two groups of four, in different years, and they generally serve for just under five years. Interestingly, any person over twenty-one years may be appointed to the Legislative Council, and there have been instances of the Keys looking beyond their own number for such an appointment.

Originally the Council fulfilled a variety of legislative and executive roles, as well as being composed of the principal executive officers of the Island, who had functions in their own right. This century, however, has seen the division of the Council into the Executive and Legislative Councils, the former evolving into the Council of Ministers, as is discussed below. The Legislative Council can make declaratory statements or consider formal questions, but the majority of its work is considering legislation proposed by the House of Keys. As we have seen in the discussion of the legislative process, while the Legislative Council retains some influence over the progress of legislation, in many cases its objection to a piece of legislation can be over-ruled by a united House of Keys ⁴.

The Legislative Council is presided over by the President of Tynwald, who remains impartial but does have a casting vote.

¹See further, Liddell to Lieutenant-Governor Loch, 11 August 1881 [Letterbooks 37,320]; Lieutenant-Governor Loch to Under-Secretary of State, 27 August 1881 [Letterbooks 37,340]. The latter ends with "Correspondence on above subject transferred to confidential letterbooks" - said letterbooks not having survived.

²See D.G. KERMODE, 72-9.

³See Isle of Man Constitution Act 1919 s.6,7; Isle of Man Constitution Act 1961 s.10(1); Isle of Man Constitution (Amendment) Act 1965 s.1; Isle of Man Constitution (Amendment) Act 1975 s.7; Constitution (Legislative Council) (Amendment) Act 1980 s.1,2.

⁴See p.14.

The Executive. ¹

The Council of Ministers.

Before 1946 "in form the Governor alone [was] responsible for policy and for [Government] and for the introduction of legislation" ² although he was advised by the principal officers of the Island who acted as a Council. In 1946 Lieutenant-Governor Rhodes Bronet was instructed to form an Executive Council of seven members, recommended by Tynwald ³. The Executive Council had no legal basis, however, and "responsibility for the initiation of legislation ... remained very much in the hands of the Lieutenant-Governor" ⁴.

In 1961 the Executive Council was placed on a statutory footing, with an amended membership more closely tied to the existing structure of the Boards of Tynwald ⁵. At the same time, the Executive Council began to "consider and amend legislative and policy proposals from Boards of Tynwald and the Attorney-Generals Department and established an order of priority for debate in Tynwald" ⁶. From that date, the Executive Council, later the Council of Ministers ⁷, exercised an increasingly active role in the initiation of legislation and of policy, at the expense of the role of the Lieutenant-Governor. Today, the Council of Ministers exercise executive powers in a way analogous to the British Cabinet, while the Lieutenant-Governor fulfills the role of Head of State.

The development of the Council of Ministers is arguably the most important constitutional development of the last decade. Unlike development in other areas of the constitution, however, it has been relatively abrupt, with major changes in relatively novel institutions. Accordingly, the recent history of the executive government of the Island should be discussed in greater detail.

¹ Local government is not discussed here. See COUNCIL OF MINISTERS, The Structure of Local Government in the Isle of Man, [Douglas] (1994).

²Notes of a Deputation to the Home Secretary on Proposed reforms of the Constitution of the Isle of Man, 17 October 1944, [Douglas] (1944) at 6 per Attorney General R.B. Moore.

³D.G. KERMODE, 47.

⁴D.G. KERMODE, 124.

⁵See p.118.

⁶D.G. KERMODE, 126.

⁷See Governors General Functions (Transfer) Act 1980; Constitution (Executive Council) Amendment Act 1980; Constitution (Amendment) Act 1981; Constitution (Executive Council) Act 1984; Constitution (Executive Council) (Amendment) Act 1986; Constitution (Executive Council) Amendment Act 1986; Government Departments Act 1987; Council of Ministers Act 1990 s.1-5; Council of Ministers (Amendment) Bill 1992; Transfer of Governor's Functions Act 1992 s.1;

For much of this century, executive government was centred in the Lieutenant-Governor. In 1946 the Executive Council was created to advise him in exercise of his functions. The Executive Council was to be drawn primarily from the Chairmen of the principle Boards, which are discussed below, as recommended by Tynwald. In 1961 the Executive Council was placed on a firmer footing when it became a statutory body with a more clearly defined membership.

Under the Isle of Man Constitution Act 1961, the Executive Council was composed of the Chairman of the Finance Board, the Chairmen of four Boards of Tynwald elected by Tynwald, and two further members of Tynwald appointed by the Lieutenant-Governor. Executive Council was presided over by the Lieutenant-Governor. In its earliest statutory form, the Executive Council retained both a strong link with the Board system, and an attempt to share power between Tynwald and the Lieutenant-Governor in a way seen in the development of the Legislative Council. Both of these characteristics were eroded by the next important development, when membership was reformed in 1968. It was to be composed of two Members of the Legislative Council, and five MHKs. One member was required to be the Chairman of the Finance Board, who counted against the allowance for his Branch ¹. In 1984 the linkage to the existing Board system was again re-emphasised. The Council was reformed to comprise an elected Chairman, and the chairmen of the eight most important Boards of Tynwald ².

This linkage was reversed in 1986, when appointment to the Boards of Tynwald followed from membership of the Executive Council, rather than vice versa. By the Constitution (Executive Council) Amendment Act 1986 the Chairmen of Executive Council was renamed the Chief Minister, and was to be nominated by Tynwald after a General Election of the House of Keys. The Chief Minister then nominated a team of nine ministers who, if approved by Tynwald, became Chairmen of the relevant Boards. The Chief Minister and his Ministers became the Executive Council. Once appointed, the Chief Minister held office until a general election, or loss of a vote of confidence in Tynwald, or he took a post incompatible with the office of Chief Minister. His Ministers initially enjoyed similar security, generally holding office for three years.

In 1990, the Executive Council was renamed the Council of Ministers. More importantly, Tynwald lost control over the nomination of Ministers, who were appointed solely by the

¹ Isle of Man Constitution Act 1968 s.1.

²Constitution (Executive Council) Act 1984 s.1(1).

Chief Minister, and held office at his pleasure ¹. Today the Council of Ministers consists of the Chief Minister, and the Ministers for the Treasury; Home Affairs; Industry; Agriculture, Fisheries and Forestry; Health and Social Security; Tourism, Leisure and Transport; Local Government and the Environment; Education; and Highways, Ports and Properties ².

The Council of Ministers performs four important functions. Firstly, as in Tynwald, it provides a forum for discussion and determination of policy. As well as being composed of fewer members than Tynwald, the Council meetings are confidential. Secondly, it exercises a number of powers conferred to it by statute, generally inheriting the exceptional and residual powers formerly exercised by the Lieutenant-Governor. Thirdly, it has the authority to issue orders to the Statutory Boards and Government Departments. Finally, it deals with the external relations of the Isle of Man Government.

Government Departments and Statutory Boards. ³

The Board system was a distinctive part of the Manx constitution, which provided for Members of Tynwald to share in political power ⁴. In 1978 there were twenty-two boards, each of which was composed of Members of Tynwald, and exercised corporately key executive functions. Given that there were so many boards, it was inevitable that the bulk of Members of Tynwald would sit on more than one such board, and that every elected Member of the House of Keys would have some say, in some sphere, in policy.

Whatever its special constitutional advantages in a small jurisdiction with no traditional of political parties, the Board system could appear unwieldy and cumbersome. In parallel with the development of Ministerial government in the Island, came the demise of the Boards of Tynwald. After 1985 these boards were consolidated into Departments under the control of a Minister. A good example of this consolidation is the Department of Highways, Ports and Properties, which was formed from the Airport Board, the Harbour Board, the Highway and Transport Board, and the Government Property Trustees ⁵.

¹ Council of Ministers Act 1990. The increased emphasis on the Chief Minister resulted in the legal requirement of a statement of policy by each candidate for the position - Council of Ministers (Amendment) Act 1994 s.1(2).

² G.C. 412/86; G.C. 349/90.

³ See GUMBLEY K.F.W., "Government Departments and Statutory Boards", (1988) 18 Manx L.B. 6.

⁴ D.G. KERMODE, p.126-130.

⁵ G.C. 190/86. See also Statutory Bodies (Transfer of Functions) Act 1969.

The Government Departments Act 1987 makes detailed provision for the constitution and functioning of Departments. Of greater interest than the detail of this Act is the shift from a corporate responsibility to Tynwald, owed by all the members of the old Boards, to a position where the Minister has the authority to exercise all the functions of the Department, but is responsible to Tynwald for the conduct of his Department in its discharge of government policy and of his duties as Minister. Although non-ministerial members of the Department can be appointed by the Governor-in-Council from the Members of Tynwald, the shift in emphasis from corporate to sole responsibility is very pronounced.

Additionally, this constitutional change has to some extent resulted in a proportion of elected members of Tynwald who have little or no formal power in governing the Island. Since the abolition of the old Board system, those members of Tynwald who are not Ministers or in some other way members of Departments no longer have a direct role in government policy. The formation of the Alternative Policy Group, which consists of a small number of MHKs and was formed after the last appointment of Ministers, may reflect this focusing of power within an already small jurisdiction.

Slightly outside the normal Departmental structure are the Statutory Boards. Despite the name, these are not surviving Boards of Tynwald, but are rather specialist bodies exercising certain statutory responsibilities and authorities. They are subject to direction from the Council of Ministers, or a relevant Department, and are accountable to Tynwald. Additionally, while not formally headed by a Minister, in practice many are chaired by a relevant Minister. The principal differences between the Departments and the Statutory Boards are the statutory basis for the Boards regulation, which lies in the Statutory Boards Act 1987, and the emphasis on corporate decision making in the Boards, which as we have seen is no longer the case in the Departments.

Conclusions.

In the Manx jurisdiction, as in the English, links between the Executive and Legislature, at least at the highest levels, are very strong. While compared with, say, 1946, modern institutions do spread these powers between a number of organs and individuals, it remains the case that many of the most important powers are exercised by a relatively small number of individuals. Although unavoidable in such a small jurisdiction, this may have been exacerbated by the development of the ministerial system.

Chapter Nine: Separation of Powers - The Judiciary.

It is clear from the preceding chapter that the separation of the executive and the legislature is far from complete. The separation of the judiciary from the other organs of government is much stronger, especially with the move this century to reduce the role of the Deemsters in executive government and preparation of legislation. This chapter discusses the Manx court system, the permanent and temporary judicial officers of the Island, and the Manx Bar from which most of them are drawn.

The Manx Court System.

As discussed earlier, by Manx customary law the judicial function within the Island was spread over a wide variety of courts which, despite nominal independence, were often the same figures acting under a different title. This diversity was simplified by the *Isle of Man Judicature Act 1883*, which placed the Manx courts, and their officers, upon a statutory basis. This Act was restated, with amendments, by the *High Court Act 1991*, which is now the governing statute for the superior courts of the Isle of Man. It should be noted that the criminal courts of the Island, including the courts of summary jurisdiction, are also governed by a variety of other important statutes. These courts are discussed in more detail elsewhere¹.

Under the Act, the judges of the High Court are the First and Second Deemsters, and the Judge of Appeal². These officers are discussed further below. The Deemsters may sit in the civil courts of first instance which, as in the English High Court, are divided into a number of Divisions³. Additionally, the Deemsters may sit in the Appeal Division, more widely known as the Staff of Government, where they are assisted by the Judge of Appeal.

The Staff of Government enjoys a wide appellate jurisdiction in relation to both civil and criminal matters. Additionally, there is the possibility of appeal to the Judicial Committee of the Privy Council, which has heard a small number of Manx cases, often of considerable importance.

¹ See p.188

² High Court Act 1991 s.3.

³ High Court Act 1991 s.2.

The Permanent Judicial Officers of the Isle of Man ¹.

An important question within such a small jurisdiction as the Isle of Man is the identity of the judicial officers. The most important Manx legal officers were the Deemsters and the Attorney General ². The Attorney General has been included in this discussion, although he had no judicial role to fulfil, as he was a key figure in the Manx legal system, whose opinion was often sought on matters of considerable legal and constitutional import, as well as possessing responsibilities and rights in the area of criminal prosecutions.

The first point to make is the interrelationship between the posts. The First Deemster, to all extents and purposes the most senior Manx judicial officer, had generally served a period as the Second Deemster ³. After 1816 all First Deemsters had judicial, or Attorney Gubernatorial, experience before appointment. Of these twenty First Deemsters, seventeen were previously Second Deemsters. It would appear that the constitutional practice was to elevate the incumbent Second Deemster to the senior post upon a vacancy ⁴.

Turning to Second Deemsters, before 1921 Second Deemsters lacked previous judicial experience. Between 1921 and 1947 all five appointees had served as Acting or Deputy Deemster before their appointments. Sydney James Kneale, appointed in 1947, was the first Second Deemster to enter the post via the office of Attorney General. After 1974 three of the four Second Deemsters were Attornies General, and it may be that a constitutional practice is

¹The raw data upon which this section is based is taken from *Liber Juramentorum*, available for consultation in the Manx General Registry, Government Offices, Douglas, Isle of Man.

²See (1824) *Mona's Herald* 10 November, when Governor Atholl acted as judge of the Chancery Court - "throughout the whole time the Court was occupied, his Grace evinced a discernment and knowledge of the more regular modes of the English Courts of law, and we trust he will endeavour to modify the many irregularities here."

³ Between 1777 and 1793 only a single Deemster was in office, thus reducing judicial opportunities for his successors. It should be noted that there are only ever two permanent Deemsters - the First and Second Deemsters.

⁴The two exceptions to this in the last century are explicable by exceptional circumstances. James Gell had held the post of Attorney General for thirty-two years when appointed First Deemster, and had written authoritatively on a wide range of legal topics. George Edgar Moore was appointed on the same day as the new Second Deemster, Robert Kinley Eason, and it would thus appear that the previous Second Deemster, Bruce Whyte M'Pherson, was unable or unwilling to retain his old post, let alone accept elevation.

emerging whereby the Attorney General is to be favourably considered for the vacant post of Second Deemster.

No Attorney General was appointed after holding a Manx judicial post. It thus appears that, generally, there was a hierarchy of appointments. The First Deemster would have served as Attorney General or, more commonly, Second Deemster, before taking office. The Second Deemster may well have served either as Attorney General or as a temporary officer. In both cases these important judicial officers were exposed to the arguments and culture of the Manx Bar before taking their post, thus mitigating the significance of their own background should they not be members of the Manx Bar before appointment.

In fact, mitigation was not needed. The most significant feature in the appointments of the Manx judiciary was the reliance upon a pool of qualified Manx advocates. We will consider the officers in reverse hierarchical order - Attorney General, then Deemsters.

The first two Attornies General appointed after 1777 were English lawyers rather than Manx advocates. After 1844 all Attornies General were members of the Manx bar. Charles Richard Ogden, appointed in 1844, did not become an advocate until after his appointment. The later incumbents were all Manx advocates before appointment, for an average of 22.5 years ¹. It would appear from the available data that before 1866 the Attorney General was appointed from outside the Manx bar while, after that date, it was a post held by very experienced members of the Manx bar.

Turning to the Deemsters, we have already established that the First Deemster normally served as Second Deemster for a time. Accordingly, discussion may centre on appointees to the latter post. After 1794 only two of the twenty-five Second Deemsters were not members of the Manx Bar ². Turning to the time of call before appointment, there does appear to have been a slight change after 1900. Of those appointed before 1900, the average time of call was 19.1 years ³. After 1900, the average was 30.6 years ⁴. It would appear from this data that the

¹With a minima of eighteen and a maxima of thirty-two years.

²These were William Drinkwater, 1847-1855, and Stevenson Stewart Moore, 1900-1905.

³With a minima of seven and a maxima of twenty-seven years.

⁴With a minima of twenty-two and a maxima of thirty-eight years.

usual practice was to appoint extremely experienced members of the Manx bar to the post of Second, and thence First, Deemster.

As well as these principal, inter-related, officers, before 1918 there existed a separate Clerk of the Rolls. Amongst other duties, the Clerk of the Rolls could advise the Lieutenant-Governor on the laws where it was inappropriate that a particular Deemster act - for instance where an appeal from that Deemster was being heard. In 1918 the posts of Clerk of the Rolls and First Deemster were merged, the gap in the judicial roster being filled by a Judge of Appeal, as discussed below ¹. The Clerk of the Rolls often had experience of other judicial posts although no clear pattern of appointment can be discerned. The linkage of the Clerk of the Rolls to the Bar is, however, clear. Of the Clerks of the Rolls appointed after 1777 only one was not a Manx advocate, and the average period of call for those who were advocates was 24.4 years ². Thus, the Clerk of the Rolls was as immersed in the Manx Bar as the Deemsters.

Official correspondence also indicates that Manx judicial figures were seen as being drawn appropriately from the Manx Bar. In 1814, for instance, an unsuccessful applicant to the Bar petitioned against the decision of the Lieutenant-Governor. One of the reasons given for the rejection was that:

"it [has not been usual] to admit to the Manx Bar persons who are not natives of the Island; for as the Deemsters ... are selected from the Bar, and as their proceedings in their Courts are generally in the Manx language, it has been customary to consider the Bar as a school for preparing fit persons to fit the office of Deemster" ³

In 1816, the Lieutenant-Governor suggested, unsuccessfully, that "the senior practitioner of the Manx bar" be appointed to the vacant post of Attorney General ⁴. But in 1818, in relation to a vacancy as Deemster, the Lieutenant-Governor ensured, after being informed that the

¹See Isle of Man Judicature Act 1883 s.5, 32; Judicature Amendment Act 1918 s.2-6,9; High Court Act 1991 s.2,3.

²With a minima of four years and a maxima of fifty-two years.

³Lieutenant-Governor Smelt to Beckett, 19 February 1814 [M.M.A. - GO 2/8]. The Lieutenant-Governor also recognised the benefits which increased competition might bring to the Manx Bar. On this case see further Mills to Lieutenant-Governor, 23 October 1822 [M.M.A. - GO 3/41]; Lord Bishop of Sodor and Man to Lieutenant-Governor, 25 December 1821 [M.M.A. - GO 3/40].

⁴Lieutenant-Governor Smelt to Lord Sidmouth, 25 July 1886 [Letterbooks 2,189].

British Government intended to appoint an English barrister, that a named Manx advocate be appointed in line with the ancient practice of filling up vacancies from the Manx bar ¹.

Perhaps most strikingly, in 1854 the Manx Bar complained, as a body, at the planned appointment to the Bench of

"a Gentleman from the Bar of England who, however otherwise qualified, was wholly unacquainted with the practice of the Courts of this Island and a stranger to its laws and customs".

While admitting that the Home Office could appoint whomsoever it wished, the Bar noted that in Ireland the practice was to appoint from the local Bar, and that they had claims to elevation. Lord Palmerston thought there was justice in their representation, and that Manxmen were to be appointed to fill later vacancies ². Further to this idea that the Bar had a corporate interest in vacancies in Manx judicial posts, in 1882 Attorney General Gell wrote:

"The Bar of the Island has a limited sphere of action - and there are not many offices to be looked at by way of promotion. It is an incentive to the thorough study of the law that there be some prizes to which Members of the Bar may with laudable ambition aspire". ³

Temporary and ad hoc Manx Judicial Officers.

As well as the permanent officers, English barristers, or more rarely Manx advocates, could be temporarily appointed to hear cases, or carry out the duties of the Attorney General. The most important development in the twentieth century has been in the use of Acting Deemsters. Useful information can be gained from the commissions of the Acting Deemsters, and comparison of these commissions with the roll of advocates.

Before 1963 all appointments were expressly justified by the circumstances making a temporary appointment necessary. For instance, because there would be a conflict of interest if the Deemster were to act ⁴, or the Deemster was incapacitated by absence ⁵, illness ⁶, or

¹Lieutenant-Governor Smelt to Lord Sidmouth, 14 May 1818 [Letterbooks 3,21]. See also Lieutenant-Governor Smelt to Lord Sidmouth, 1 March 1819 [Letterbooks 3,42]; Lieutenant-Governor Smelt to Lord Sidmouth, 5 October 1818 [Letterbooks 3,27]; Hobhouse to Lieutenant-Governor Smelt, 4 December 1818 [Letterbooks 3,32].

²See P.R.O. - H.O. 45/ O.S. 5362.

³Attorney General Gell to Lieutenant-Governor, 25 November 1882 [Letterbooks 37,601].

⁴See Commission of R.B. Moore (1936). See also R.B. Moore (1923), where the appointment was justified because both Deemsters "when practising advocates advised in relation to the matter in dispute between the parties".

⁵See Commission of H.R. Gelling (1944).

⁶See Commission of R.B. Moore (1923).

death ¹. There is some, admittedly slender, evidence that the Lieutenant-Governor, who issued the commission, regarded some explanation, no matter how vague, as important. In 1900 H.G. Shee was appointed in relation to the notorious Dumbell trials, because the Deemster sought to be relieved "for reasons satisfactory to me" ².

After 1963 there was a change in approach. Reasons for the appointment were generally, but not invariably, given ³. When given, the reasons were the same as those earlier in the century. In both this period and earlier in the century, commissions were generally limited to a particular case and ancillary matters, except where the appointment was to cover an incapacity, where the commission was for a particular duration or session of the court.

After 1991 the commissions were mainly for a period of months - either generally, or to serve in particular courts. Reasons ceased to be given in the commission.

It cannot be proven that the change in the style of commissions reflects a change in the substance of commissioning - it may simply indicate a change in the practice of the administrator drafting the commissions ⁴. Nonetheless, it can be said that the demise of express reasons for the commission, and the broadening of the effect of commission, indicate a reduction in the need to defend and define temporary commissions ⁵. From an exceptional mechanism which must be limited and justified, the Acting Deemster has become a more integral part of the Manx legal system

Given the increased importance of the Acting Deemster, it is useful to consider how far those appointed were importations to the Manx legal system, and how far they were already actors in the legal system, temporarily elevated to a new status. Commissions have increased vastly since 1980. Throughout the eighties, the majority of these commissions were issued to English barristers, often to Queen's Counsel. After 1990 the majority of commissions were

¹See Commission of G.E. Moore 1963.

²For a background to this, see Chappell C., The Dumbell Affair, (1910) [M.M.A.].

³See Commission of J.M. Davies (1966).

⁴The latter point receives some support from the records. The Book of Commissions started a new volume in 1991, and there is a definite change in the mode of commission in the new book.

⁵The change also reduces the extent to which the commissions themselves can be analysed in detail. Compare the analysis of the commissions in this section with the analysis of licenses to act as a temporary advocate discussed in section IV.

still issued to English barristers, but members of the Manx Bar also began to be commissioned to hear cases ¹. Thus, the Acting Deemster's increase in importance reflects an increased role for English lawyers in the Manx legal system.

It is difficult to determine from the commissions exactly when they would be given - partly because of the omission of reasons from later commissions, and partly from the change in commissions from case-by-case to period-of-time. There is some evidence that advocates would be preferred for appointment for set times (37 commissions, 20 before 1991) over barristers (20 commissions, 3 before 1991). It may be surmised, therefore, that English barristers were being imported because of the characteristics of the individual cases they heard. It is difficult to be more precise, but it should be noted that the Lieutenant-Governor was also responsible for issuing temporary licenses to practise as an advocate, which were definitely granted on the basis of the special characteristics of the case. Taking this as an analog, Acting Deemsters may well have been appointed where a conflict of interest prevented a Deemster hearing a case, the case would have been so demanding as to effectively prevent a Deemster carrying out his other duties, or the case required special judicial expertise. Given the status of Manx advocates as general practitioners with their own permanent clientele, analogous to a solicitor in England, they may be unsuitable for the two latter cases, but would seem as capable of dealing with a conflict of interests as a temporary incapacity or vacancy. The increase in temporary commissions issued to Manx advocates may indicate a change in policy, favouring Manx advocates where they are suitable for the needs of the case.

Another important judicial officer is the Judge of Appeal. We have already seen how in 1918 the position of Clerk of the Rolls was merged with that of First Deemster, and their role in the appellate process taken by the Judge of Appeal. While not a temporary officer *per se* the Judge of Appeal functioned in the Isle of Man on an *ad hoc* basis, only coming to the Island during the period of their commission when required to by a case. Thus, they may fairly be discussed in this section.

By law, the Judge of Appeal was required to be a Queen's Counsel, and thus an English barrister ¹. The seventeen Judges of Appeal appointed constitute, therefore, an obvious route

¹See COLUMNIST, "Manx Lawyer to be a Deemster for a Day", (1991) Manx Independent 6 September; Sixth Interim Report of the Advocates Fees Committee [Douglas] (1989).

for English influences to enter Manx law. To a certain extent, however, their influence could be ameliorated by the structure of the Manx appellate courts. Since 1921 the Manx appeal courts have consisted of a Deemster and a Judge of Appeal - in case of a failure to agree, the Deemster decides which judgment is to be taken as the judgment of the court. Effectively, therefore, the Deemster can overrule the Judge of Appeal ².

The Manx Bar.

Before 1763 the Manx Courts were not served by a unified or regulated profession, although there is some evidence that a nonregulated group of persons prepared to act in another's cause existed ³. Attorney General Busk, who was not a member of the Manx Bar, wrote of the situation before 1765 some years later:

“Jurisprudence was not attended to as an art, by a people little acquainted with any higher employment than that of steering a fishing-smack or turning the earth with a spade. Having no lawyers, the rustic sailors alone managed their own contests and those of their neighbours, and disputes thus rudely conducted, juries and judges almost as illiterate as the parties, terminated by a hasty decision with little regard to principle or forms.” ⁴

The first attempt at regulation was made in 1763, when an Act of Tynwald noted:

“Whereas much litigiousness and contentions are fomented and carried on by several ignorant and evil-minded persons, who provoke lawsuits and pretend to practise as Attornies therein, although altogether unqualified, to the great trouble and perplexity of the Courts ... and also to the great inconveniency and detriment of the public.” ⁵

The Act then prohibited practising as attorney in another's cause except by approved persons who had taken an appropriate oath, the Attorney General, or serving members of the House of Keys, who claimed their customary status as experts in Manx law to secure their exemption. The Act expired in 1768.

Permanent regulation began in 1777, when another Act of Tynwald, noting that “the custom of permitting persons not bred to the profession of the law to practise as attornies hath been found greatly to promote a spirit of litigation” ⁶, provided that only those commissioned by

¹This is a slight oversimplification, as it is now clear that the Crown could make a Manx advocate Queen's Counsel.

² See also Attorney General for the Isle of Man v Moore [1938] 3 All ER 263.

³ W. Camden, *Brittania*, (1695) Manx Society 17,16 at 24 and 117.

⁴Attorney General Busk's deposition to the Commission of Inquiry, (1792) Manx Society 31,99.

⁵ Attorneys Fees Act 1763 s.11.

⁶ Attornies Act 1777, preamble.

the Lieutenant-Governor could practise as an advocate in another's cause. The Lieutenant-Governor delegated consideration of individual commissions to one or more of the legal experts in the Isle of Man, most likely the Deemsters ¹.

In 1826 Tynwald was in a position to further regulate entry to the, by now firmly established, legal profession. By the *Advocates Act 1826* no one was to be admitted to the Bar who had not served five years "clerkship", either at the Rolls Office or to a legally admitted advocate, or who was under twenty-one years of age ². The Lieutenant-Governor was enjoined "to examine and enquire, by such ways and means as he may think proper, touching his fitness and capacity to act as an attorney" ³. Finally, it was provided that the Act was not to be considered to hinder the power of the Lieutenant-Governor to license an English barrister as an advocate ⁴.

The Act of 1826 has been subject to considerable amendment, addition and repeal, but it does raise three legal issues which persist in their importance: (a) entry to, and period of clerkship or articles; (b) examination of would-be advocates; (c) licensing of English barristers to practise at the Manx Bar.

Entry Requirements for Articles.

For some time there was no legal limit on who could be offered articles. The first restriction on those starting articles were the Regulations of 1872, which are unsatisfactorily documented. A later set of Regulations, purporting to revoke them, indicates that they were issued on the second of February 1872, but correspondence from the issuing Lieutenant-Governor indicates that the correct date was the second of May, 1872. In neither case is the Regulation entered in the Manx General Registry Calendar, and the Regulation, which is contained in the Manx General Reference Library's catalogue, is not to be found in their otherwise definitive collection of Manx statutory instruments, which includes documents of similar status, such as the Declaration of 1843, discussed below. Accordingly, in this text the

¹ See Lieutenant-Governor to Liddell, 6 January 1873 (G.O. 13/51).

² *Advocates Act 1826* s.1-2.

³ *Advocates Act 1826* s.2.

⁴ *Advocates Act 1826* s.8.

contents of the Regulation are inferred from official correspondence concerning the duties of the Deemster under the new regulations ¹.

It appears from this correspondence that the Lieutenant-Governor, unhappy with the examination of articulated clerks, provided for written examinations of students on general matters as well as on Manx law. It thus appears that in 1872 a preliminary examination, aimed at ensuring an adequate level of “general attainment as well as legal proficiency” in articulated clerks was instigated ². The detailed regulations of 1925 and thereafter make it clear that these preliminary examinations were to establish the suitability of the students to *begin* their articles, by assessing their general level of education ³. From 1925, at the latest, graduates and holders of some other formal academic qualifications were exempt from the preliminary examination. In 1944 English barristers were also exempted from the preliminary examination ⁴, and in 1957 this was extended to other qualified legal professionals ⁵.

In 1978 the preliminary examination was abolished, but replaced by legal restrictions on who could take articles. The 1978 Regulations limited articles to graduates; legal professionals of the United Kingdom and Ireland; holders of some A and O level qualifications; and others able to demonstrate equivalent educational attainment ⁶. In 1987 these rules were changed - legal professionals of the United Kingdom and Ireland retained their access, but otherwise admission was open only to graduates who had completed a degree covering the core law topics, or who had added a CPE or equivalent to a first degree and then gone on to complete the academic stage of qualifying as an English solicitor or English barrister ⁷. Thus, today admission to articles is restricted to those who have undergone substantial legal education outside the Manx jurisdiction.

¹ Lieutenant-Governor to Liddell, 6 January 1873; Liddell to Lieutenant-Governor, 6 February 1873 (G.O. 13/51).

² See Lieutenant-Governor to Secretary of State, 29 November 1873 (G.O. 13/89).

³ Admission to Manx Bar 1925, Admission to Manx Bar 1944, Admission to Manx Bar 1952, Admission to Manx Bar 1956, Admission to Manx Bar 1957, Admission to Manx Bar 1969.

⁴ Admission to Manx Bar 1944 and later codes.

⁵ Admission to Manx Bar 1957 and later codes.

⁶ Regulations for Admission to the Manx Bar 1978.

⁷ Advocates Admission Regulations 1987, Advocates Admission (Amendment) Regulations 1989, Advocates Admission (Transitional Provisions) Regulations 1990.

Once a student was admitted to articles, they had to serve for a period before applying for entry to the Manx Bar. The 1826 Act laid down a period of five years clerkship. This did not apply to English barristers, who the Lieutenant-Governor could admit at his discretion ¹. There is some evidence that, rather than allow English barristers to practise without clerkship, Lieutenant-Governors allowed a discount in the period. In 1826 Carrington, an English barrister ², petitioned over the refusal of Lieutenant-Governor Dawson to admit him to the Bar. He had served a three year clerkship with Roper, a Manx advocate who had, for some of the period, not been in practice. The Lieutenant-Governor's only objection to his admission was that he had failed to complete a three-year clerkship with a practitioner, and he noted the contents of the 1826 Act. While he recognised he had a discretion in the matter, he suggested that the rules of the Act "may serve to show ... that I have in this instance exercised the discretion ... with a due regard to the respectability of the profession" ³.

Thus, English barristers might expect to serve a reduced clerkship ⁴. In 1874 a further Act of Tynwald reduced the period of clerkship for some graduates of Scots, Irish and English Universities to three years only ⁵.

In 1983 the reduced period for English barristers was formalised, and extended to legal professionals of the United Kingdom and Ireland. After 1983 all the above were required to serve two years clerkship only ⁶. In 1989 the Lieutenant-Governor reduced the period of articles for all clerks to two years ⁷.

Examinations.

¹ Advocates Act 1826 s.8.

² This is the only reading which makes sense of this case is entirely consonant with the correspondence discussed below.

³ See Dawson to Smelt, 3 October 1826 (G.O. 4/18); Dawson to Smelt, 5 November 1825 (G.O. 4/18).

⁴ By 1930 the expected period for English barristers to serve had been reduced by two years. See Admission to Manx Bar 1930.

⁵ Advocates Act 1874 s.13. Later orders increased the range of awarding institutions whose degrees would reduce the period of clerkship eg. Advocates Act 1956 s.2.

⁶ See Regulations for Admission to Manx Bar (Amendment) (no.2) 1983, Advocates (Reduction in Period of Articles) Order 1983.

⁷ Advocates (Period of Articles) Order 1989.

Mere clerkship or articles was not sufficient to become an advocate. There is some evidence that, before 1828, the Lieutenant-Governor required some examination of the legal attainments of candidates for the Bar ¹, and the 1828 Act shows that examination of articulated clerks before admission was required. It may be that these examinations were not especially stringent, however, as in 1843 the Lieutenant-Governor found it necessary to remind students that they would undergo “a strict examination and enquiry ... as to their fitness and capacity” ². These examinations were *viva voce* and carried out by the Deemsters and other legal officers of the Manx government ³.

In 1872 the Lieutenant-Governor, in the Regulations discussed at some length above, established preliminary, intermediate and final examinations, all of which were to be in writing and set by the Manx legal officers or suitable examiners ⁴. The preliminary examinations have already been discussed.

The intermediate examinations consisted of two parts - outlines of Manx law, and bookkeeping ⁵. Exemptions were available to the law part of the intermediate examinations - in 1957 this applied to legal professionals in the United Kingdom, Ireland, and the Channel Islands ⁶. In 1978 the intermediate exemptions for law were abolished for all but English barristers ⁷, and English barristers lost this benefit in 1983 ⁸.

These class exemptions were never available for final examinations, which were restricted to legal issues, and in 1987 the distinction between intermediate and final examinations was

¹ See Lieutenant-Governor to Liddell, 6 January 1873 (G.O. 13/51).

² Notice, 2 March 1843.

³ See Lieutenant-Governor to Liddell, 6 January 1873 (G.O. 13/51).

⁴ See Lieutenant-Governor to Liddell, 6 January 1873; Liddell to Lieutenant-Governor, 6 February 1873 (G.O. 13/51); Lieutenant-Governor to Secretary of State, 29 November 1873 (G.O. 13/89); Mills to Lieutenant-Governor, 20 October 1873 (G.O. 21/96).

⁵ Admission to Manx Bar 1925, Admission to Manx Bar 1944, Admission to Manx Bar 1952, Admission to Manx Bar 1956, Admission to Manx Bar 1957, Admission to Manx Bar 1969, Admission to Manx Bar 1978. Exemptions were available for the book-keeping examination, as well as the exemptions for law discussed in the text.

⁶ Admission to Manx Bar 1957 and later.

⁷ Admission to Manx Bar 1978.

⁸ Regulations for Admission to Manx Bar (no.2) 1983.

replaced with a requirement that articled clerks pass five “heads” of examinations before being admitted to the Bar. A provision remains for exemption from particular examinations for particular students, but no class exemptions exist.

To summarise the current position, articles may only be offered to law graduates, or non-law graduates who have undertaken a CPE course, and who have completed the English Legal Practice or Bar Finals courses; or to barristers, advocates and solicitors of the United Kingdom or Ireland. The clerk then serves a period of two years articles, and passes five heads of examination on Manx law and bookkeeping.

Licensing of non-Manx Legal Professionals.

In addition to permanent advocates, practitioners from other legal jurisdictions could be temporarily licensed to practise by the Lieutenant-Governor. The *Advocates Act 1828* s.8 simply refers to his licensing an English barrister to practise as an advocate. As has been noted above, this could be used to give English barristers special conditions of entry to the Manx Bar. It also appears to have formed the basis for temporary licensing of English Barristers. In 1969, in a set of regulations primarily concerned with examinations for candidates seeking admission, the power of the Lieutenant-Governor to license English barristers in exceptional circumstances was recognised ¹. Specific regulations in 1988 and 1990 laid out a formal procedure to follow when seeking such a license ².

In 1991, in a directive which must be regarded as of no legal force but of very great practical force, the Lieutenant-Governor detailed the “very exceptional circumstances” which would normally be followed before licensing an English barrister to practice. These criteria, which seem to reflect accurately the exercise of the licensing power, were: (a) no Manx advocate is available; (b) there would be a conflict of interest if a Manx advocate acted; (c) an unusual kind of expertise not readily available on the Island is required; (d) the case is estimated to be so lengthy that unreasonable demands would be made on the resources of the Manx legal profession if no licence were granted ³.

¹ Admission to Manx Bar, 1969.

² Directions Regarding the Licensing of English Barristers to Appear in Manx Courts, 1988, 1990.

³ Directions Regarding the Licensing of English Barristers to Appear in Manx Courts, 1991.

I have discussed the details of the licenses granted elsewhere ¹. To summarise, there has been a marked increase in the number of licenses issued in the last thirty years. These licenses were always limited licenses to practice, tied to a particular case, set of cases, or inquiry. Many of these licenses were congregated around particular nexuses - the most obvious being the Summerland Fire Commission investigation, and the Savings and Investment Bank affair. From the evidence of the licenses, it may be that the Manx Bar has become a “general practice bar”, where permanent advocates are liable to be displaced in controversial, long, or intricate cases in favour of specialists from the English Bar. The large increase in licenses granted may reflect no more than a unique crisis, caused by two *cause celebres* requiring specialist legal knowledge of a sort which, realistically, such a small jurisdiction cannot be expected to have instantly available. On the other hand, given the growing importance of the financial sector in the Isle of Man, it may be that the temporary advocate - the specialist consultant - will become a permanent fixture of the Manx legal system. Alternatively, we may find that local expertise will develop, driving out English specialists from practising in Manx courts. In the latter case, the temporary advocate may serve to indicate in what areas demand for legal services in the Isle of Man is growing beyond available supply and act as a signal for Manx advocates to move into those areas.

¹ P.W. Edge, “Lawyers’ Empires: The Anglicisation of the Manx Bar and Judiciary”, [1994-5] 19 Journal of the Legal Profession 29.

Part III: Manx Criminal Law and Procedure.

Chapter Ten: General Material.

Introduction.

This chapter deals with general points necessary for an understanding of Manx criminal law and procedure. The first point to consider is the structure of criminal law, which is substantially different from that of the law of England.

The Structure and Development of Manx Criminal Law.

Before 1736 criminal law was stated almost entirely by the judicial process. In comparison with the English law of the period, there were very few statutory provisions dealing with the criminal law. Tynwald had enacted, before 1736, only 29 provisions dealing with criminal law and procedure, and no significant Acts of Parliament had been extended to the Isle of Man. The law and procedure enforced by the criminal courts was to be found, in almost every case, in custom and the declarations of the Courts and of Tynwald.

As discussed elsewhere, judicial law making in the Manx jurisdiction could be problematic, and by the early eighteenth century there was dissatisfaction with the law-making powers of the Deemsters. In 1726 the Lord attempted to cancel all unwritten laws, but was thwarted by the protest of the Keys to the Privy Council ¹. In 1730 the Lord responded to complaints caused by the uncertainty of the criminal law ² with a promise to require trial by jury before imposition of corporal punishment ³. The stage was set for a change in Manx laws, arising from the special situation on the Island, which would radically alter the balance between legislative and judicial law-making.

The Act of 1736.

In 1736 as part of a programme of law reform ⁴, it was enacted:

"That no court, judge or magistrate within this Isle whatsoever shall have power for the future to inflict any fine or punishment upon any person or persons within the said Isle, for or on account of any criminal cause whatsoever, until he ... be first convicted by the verdict or presentment of four, six, or more Men as the case shall require, upon some statute law in force in the said Island" ⁵

¹The initiative was simply dropped, and so the case never reached the stage of judgement - see MOORE R.B., "The Romance of Manx Common Law", (1927) Ramsey Courier 11 November.

²The exact cause of these complaints is unclear from surviving materials. It appears probable that some *cause celebre* brought matters to a head, but it is not possible to provide details of this.

³See the letter of Lord Derby to the House of Keys, 1730 [M.M.A.].

⁴See the preamble to the Criminal Law Act 1736.

⁵Criminal Law Act 1736.

This section combined the general requirement of trial by jury, promised by the Lord in 1730, with a restriction on some types of non-statutory offence ¹. It was argued in *Bold v Roper* ² that the Act of 1736 abrogated all laws not in writing that day, and that the Courts were thereafter to administer the laws as in England. The Court largely ignored this argument, which is refuted by the persistence of Manx forms of procedure after 1736, and Deemster Heywood observed of the plaintiff who brought this argument "it does seem to be not a little presuming for any man to profess to come from Ireland to this Island to instruct us in the knowledge of English law, and the management of our Courts". It would seem, however, that this early Act imposes some form of restriction.

The *prima facie* interpretation of the section is that only statutory offences could be prosecuted. Taking the Act as a whole, this reading would produce an absurdity as a later section of the Act deals with bail for murder, a customary offence, which would have been rendered unprosecutable by this interpretation ³. Furthermore, if this reading had been adopted then the offences of murder, rape, robbery and burglary, all of which were prosecuted after 1736, would have been without punishment. Accordingly, if this was the correct interpretation it was widely ignored ⁴.

A second possible interpretation is that no prosecution could succeed unless for a statutory offence or for a non-statutory offence that had been declared before 1736. This interpretation would preserve those offences already stated in precedential law, while preventing the Deemsters from declaring new offences. Case law does not exclude this possibility, but another source renders it unlikely. In 1797 Tynwald passed an act against, *inter alia*, forgery and perjury ⁵. In the preamble, based upon an earlier opinion of Governor Atholl ⁶, it was stated that "the crime of forgery and perjury, and subornation of perjury were by the common law of the said Isle, punishable with fine, imprisonment and corporal punishment" but that the act of 1736 required a statute law to be in force if the said crimes were to be punished. A number of customary law prosecutions for forgery may be found before 1736 ⁷, therefore, it appears that Tynwald did not accept the second interpretation. Since Tynwald at this time

¹Subject to a number of exceptions, see s.(2),(3),(5).

²*Bold v Roper* [1822] *Mona's Herald* 30 August.

³Criminal Law Act 1736 s.(3).

⁴Not impossible when the reaction of the Court to an argument on the meaning of this section in *Miller* (1814) L.P. is considered.

⁵Forgery, Perjury and Cheating Act 1797.

⁶See Stowell to Governor Atholl, 28 May 1796 [Atholl Papers, 102/2nd/21]; Address of Governor Atholl to Tynwald Court, 7 June 1796 [Atholl Papers, Bk.90 p.4].

⁷See p.217.

contained all the principal judicial officers, as well as the officer responsible for prosecuting felons and traitors, this is important evidence that the second interpretation was not being applied in 1796.

A third interpretation is that the statutory restriction applied only to misdemeanours. Customary treasons and felonies could still be prosecuted. The cases are compatible with this interpretation, as are the actions of the legislature. Accordingly, while this interpretation is not patent from the statute, it would appear to be correct. In 1817 it was stated in the preamble to the first Code that the Act of 1736 should "not be construed to extend to any Treason or Felony which subsists at, by or under the common law of the said Isle" ¹. The 1817 Act was repealed in 1872 ², while the Act of 1736 survived until 1978 ³. Given that the preamble never had the force of law, this interregnum was unimportant. The preamble was a declaration, by a legislature containing the senior legal officers of the Isle of Man, of the meaning of the 1736 Act ⁴.

Thus, the 1736 Act, while creating some uncertainty over judicial law-making throughout criminal law, limited the role of the judiciary in relation to misdemeanours to the interpretation of the small number of existing statutes. This contributed to the failure of Manx criminal law to meet the rapidly changing needs of the period. The situation could have been remedied by an active legislature, but Tynwald was notably torpid following the Revestment of 1765, a torpor aggravated by "impediments ... repeatedly thrown in the way of every act of the Insular legislature" ⁵. By the beginning of the nineteenth century commentators were criticising Manx criminal law for its failure to "provide against many offences committed in the present time" ⁶.

The Code of 1817.

In 1796 Lieutenant-Governor Shaw complained of the state of Manx law, which he claimed had been neglected since Revestment. In particular, the absence of Attorney General

¹Criminal Code 1817.

²Criminal Code 1872.

³Pre-Revestment Written Laws Act 1978 s.1.

⁴Against this interpretation is the statement of the Committee of the Legislature that the proposed Code should repeal the 1736 Act - see Report of the Committee of Tynwald, 18 February 1813 [P.R.O. - HO 98/68].

⁵Lieutenant-Governor Dawson to Lord Sidney, 30 June 1787, transmitting a memorial of the Keys [Letterbooks 1,105].

⁶FELTHAM J., A Tour through the Isle of Man, (1798). See also letter of Lieutenant-Governor Smelt to Lord Sidmouth, 7 December 1815 [Letterbooks 2,173]; BULLOCK H.A., History of the Isle of Man, [London] (1816) 312-3.

Wadsworth Busk ¹ for the preceding three years was considered especially harmful to the maintenance of effective laws, as he was the officer responsible for "framing and digesting Acts of Tynwald" ².

In 1805, Colonel Cornelius Smelt was appointed Lieutenant-Governor. One of the first problems dealt with by the Colonel has a bearing on later developments. A number of defendants were arrested for passing forged bank notes, contrary to a Manx statute ³. Due to a misunderstanding between Acting Attorney General Moore ⁴ and the Deemsters, no attempt was made to prosecute the defendants within the statutory time limit, and the Colonel was obliged to release them without trial ⁵. In 1811 the same defendants were believed to be circulating a substantial number of forged bank-notes ⁶. Lieutenant-Governor Smelt sponsored a Bill to reform the law but, although it was passed by the House of Keys, the Council rejected it, albeit with a promise to consider revision of the law at a later date ⁷.

These events provide important background to the first Criminal Code, which finally received Royal Assent in 1817. The problems of which Lieutenant-Governor Shaw complained had not been solved by 1813, and clearly Lieutenant-Governor Smelt was a man who felt the need for reform of the criminal law keenly. Also, a key factor in the development of the first Code was the absentee Attorney General.

¹An Englishman - see "Letter from the Attorney General reporting discussions in the House of Keys", [M.M.A.] (1784) 11.

² Lieutenant-Governor Shaw to Home Office, 7 May 1796 [H.O. 98/65]; Lieutenant-Governor Shaw to Home Office, 26 May 1796 [H.O. 98/65]; Lieutenant-Governor Shaw to Home Office, 22 July 1796 [H.O. 98/65]. The Lieutenant-Governor found the powerful protection available to Mr. Busk from his friends, including the British Lord Chancellor, especially distressing - see Lieutenant-Governor Shaw to Home Office, 26 May 1796 [H.O. 98/65].

³Forgery, Perjury and Cheating Act 1797 s.1.

⁴The Attorney General being absent from the Isle of Man, a surrogate fulfilled some of his functions.

⁵Lieutenant-Governor Smelt to Deemster Lace, 8 November 1806 [Letterbooks 2,43]; Lieutenant-Governor Smelt to Earl Spencer, 13 September 1806 [Letterbooks 2,37]; Earl Spencer to Lieutenant-Governor Smelt, 18 September 1806 [Letterbooks 2,38]; Lieutenant-Governor Smelt to Acting Attorney General Moore, 29 October 1806 [Letterbooks 2,41]; C.E. Powell of Her Majesty's Mint to Lieutenant-Governor Smelt, 8 October 1806 [Letterbooks 2,38]; Acting Attorney General Moore to Lieutenant-Governor Smelt, 1 November 1806 [Letterbooks 2,42]; Lieutenant-Governor Smelt to Earl Spencer, 13 November 1806 [Letterbooks 2,45]; Lieutenant-Governor Smelt to Earl Spencer, 27 November 1806 [Letterbooks 2,46].

⁶Lieutenant-Governor Smelt to J. Beckett (for Secretary of State Ryder), 13 June 1811 [Letterbooks 2,104].

⁷ibid. See also Lieutenant-Governor Smelt to J. Beckett (for Secretary of State Ryder), 10 June 1811 [Letterbooks 2,106].

On the 8th of January 1813, Lieutenant-Governor Smelt addressed the Keys on the role of the Attorney General ¹. The primary issue raised was whether it was possible to prosecute felons without the Attorney General, or his Deputy, prosecuting the case, but clearly the Lieutenant-Governor was dissatisfied with the Attorney General. He referred to the absence from the Island, and failure to perform a single public duty, of Attorney General Frankland since before 1799 ², and asked the Keys whether the state of the Island required the residence of an Attorney General. It seems clear that the drafting of Bills for consideration by Tynwald was a point to be considered here.

The legislature formed a Committee to review current law and recommend necessary statutory changes, which reported on the 18th of February 1813 ³. The Committee had drafted a number of Bills, but were unable to expand many of these suggestions beyond a mere outline. Heading Eight is of special interest. Described as "A Bill or Bills to amend the Criminal Law", the "reasons" for the Bill merit full quotation:

"To amend the act of 1629 by increasing the sum which constitutes grand larceny and making the language of the law more precise perhaps to repeal it altogether and make a new law upon the subject more suitable to the present state of society. To make a law against arson or wilful burning of houses etc.. To repeal the clause in act 1737 which says that no court shall impose fine or punishment for on account of any criminal cause etc.. Where it is said that a man is liable to be hanged in this Island (as the law now stands) for stealing or pilfering in any manner of way property to the amount of sixpence half penny - and when it can also be said that a person is not liable to capital punishment as the law now stands for wilfully laying a town in ashes, there seems to be no necessity for saying more to convince any reasonable being that amendment is wanted in the Criminal Code." ⁴

By the end of 1815 Attorney General Frankland had placed a Code revising the criminal law before the Manx legislature. Lieutenant-Governor Smelt believed the Bill could not proceed until the British Government stated how, and with what funds, Manx prisoners were to be transported under the Code ⁵. Despite the availability of the acting Manx Attorney General in London to provide advice if needed, and the urging of the Lieutenant-Governor, the Bill was unable to proceed to Royal Assent until after Attorney General Frankland had died ⁶. The final

¹Address of Lieutenant-Governor Smelt to the House of Keys, 8 January 1813 [Atholl Papers, AP X/71-4 to 8 inclusive, M.M.A.].

²It should be noted that Attorney General Frankland, like his absentee predecessor, Mr. Busk, was well connected in British political circles.

³Copy available at H.O. 98/65.

⁴Report of the Committee of the Legislature, 18 February 1813, enclosed with letter from Governor Atholl to Lord Sidmouth, 15 April 1813 [P.R.O. - HO 98/68]. See Address of Governor Atholl, 8 January 1813 [Atholl Papers, X/81-4 to 8, M.M.A.].

⁵Lieutenant-Governor Smelt to Lord Sidmouth of the Home Office, 7 December 1815 [Letterbooks 2,173].

⁶Lieutenant-Governor Smelt to Home Office, 26 December 1815 [H.O. 98/65]; Lieutenant-Governor Smelt to Lord Sidmouth, 18 April 1816 [Letterbooks 2,181].

form of the Code was very similar to that of the Bill at this stage. While the Bill required some work, it was essentially complete by this stage ¹. But it still had a long way to go, and no Attorney General to guide it.

The Lieutenant-Governor recommended the senior member of the Manx bar for the post ², but the Home Office preferred James Clarke, Deputy Recorder of Liverpool, who was appointed Attorney General on the 9th of September 1816 ³. The new Attorney General speedily took up his duties, and made a good impression on the Lieutenant-Governor. Colonel Smelt forwarded the Code for Royal Assent on the 17th of November 1816, indicating it had been framed by Attorney General Frankland "and lately revised with great industry and ability" by Attorney General Clarke, "an English barrister of ... much talent" ⁴.

Despite the talents of Mr. Clarke, the Code was refused Assent, although it was some time before the grounds for doing so, and suggested amendments, were forwarded to the Lieutenant-Governor ⁵. On the 23rd of May the Code "having undergone the alterations suggested by the Lords of the Council" was successfully sent for Assent ⁶.

The first Code consisted of sixty-one sections. The vast majority of these were definitions of criminal offences, or penalties, rather than general principles. The Code was also ambivalent as to whether it was a complete statement of criminal offences. As noted above, the preamble attempted to repair the damage done to customary offences by the Act of 1736, while the Code contained a list of offences so extensive as to minimise the need for customary offences. Additionally, the Code contained a broad clause to rectify the possible problems of an exclusive Code. By Section 46 it was provided that:

"all unlawful, indecent and scandalous actings and doings, not hereinbefore specified, to the disturbance of the public peace, and against good order and morals; or to the evil example of the subjects of our Lord the King are, and shall be held to be, misdemeanours". ⁷

¹A full list of sections which were amended, often in a very minor way, between this Bill and the Act is as follows - s. 2, 6-8, 10, 12-29, 32-35, 39, 41, 43,46-61.

²Lieutenant-Governor Smelt to Lord Sidmouth, 25 July 1816 [Letterbooks, 2,189]. See further p.145.

³J. Becket (for Lord Sidmouth) to Lieutenant-Governor Smelt, 5 September 1816 [Letterbooks 2,197]; Lord Sidmouth to Lieutenant-Governor Smelt, 9 September 1816 [Letterbooks 2,192].

⁴Lieutenant-Governor Smelt to Lord Sidmouth, 17 November 1816 [Letterbooks 2,195].

⁵Lieutenant-Governor Smelt to Lord Sidmouth, 24 April 1817 [Letterbooks 2,204].

⁶Lieutenant-Governor Smelt to Lord Sidmouth, 23 May 1817 [Letterbooks 2,211].

⁷ Code 1817 s.46. For an instance when use of this section was considered, see Attorney General Gell to Lieutenant-Governor Loch, 3 June 1869 [Letterbooks 15,429].

The provisions of the earlier Code, as would be expected from the legislative history of the measure, were largely based upon the English common law of the time, rather than extrapolation of principle found in existing Manx cases, combined with sections to deal with problems unknown to Manx precedential law. To increase the extent to which the Code marked an adoption of English law, while the Code was initially treated as a full definition of Manx law in the areas covered ¹, by 1869 it had become supplemented by a gloss of English case-law ².

The Code of 1872.

After the first Code, amendments were made to the criminal law piecemeal. Eventually, with the first Code growing increasingly elderly and unsuitable, the legislators decided to replace it. Elements of the second Code, as finally enacted in 1872, date from 1853 ³, and it could fairly be said that it had been before the Manx legislature, albeit intermittently, for upwards of twenty years ⁴. Serious interest in reform of the Manx criminal law, which eventually resulted in the new Code, revived in 1865.

On the 7th of March of that year Lieutenant-Governor Loch wrote to the Home Office, stating that he wished to introduce a Bill to amend the Manx criminal law. He was "anxious to assimilate the law as far as possible with that existing in England" and requested copies of *24 & 25 Victoria c.95-100*. These English statutes later formed the bulk of the Code of 1872 ⁵. The Lieutenant-Governor then directed Deemster Drinkwater to prepare "a Criminal Code to assimilate the law here with that which exists in England, modified only so far as the peculiar character of our courts might render necessary" and the resulting measure was extensively discussed in Council. Before it could proceed to the House of Keys, however, the Lieutenant-Governor sought the opinion of the Home Office on imprisonment and transportation ⁶. When this was provided, on the 26th of October 1868, the Bill could proceed ⁷. The Code first sent for Assent, as Lieutenant-Governor Loch pointed out, was "to a certain extent a Codification of the English criminal law ... made applicable to the existing practice of the insular courts" ⁸. But this was not enough to secure Assent.

¹See, for instance, Kelly [1824] *Mona's Herald* 24 March.

²See, for instance, Colle [1869] *Mona's Herald* 15 February.

³See Attorney General Gell to Lieutenant-Governor Loch, 24 July 1871 [Letterbooks 19,158].

⁴Lieutenant-Governor Loch to Undersecretary of State (Home Office), 12 March 1872 [Letterbooks 20,259].

⁵Lieutenant-Governor Loch to H. Waddington, 7 March 1865 [Letterbooks 10,616].

⁶Lieutenant-Governor Loch to Secretary of State of the Home Office, 17 October 1868 [draft in GO 5/41, M.M.A.].

⁷Mr. Beach to Lieutenant-Governor Loch, 26 October 1868 [GO 5/41, M.M.A.].

⁸Lieutenant-Governor Loch to Secretary of State of the Home Office, 1 November 1870 [Letterbook 18,542].

The Code was returned to Loch on the 28th of December, 1870, with the report of the British Law Officers explaining what revision was needed. In the first place, the Law Officers objected to a number of provisions concerning postal offences which they understood to be contrary to an Imperial statute extending to the Isle of Man: "it is not competent for Tynwald Court to pass enactments inconsistent with its provisions, and in some of these sections there are obvious errors". Secondly, a number of provisions were selected as being wrong in principle - for instance a juxtaposition of sections so that theft of a letter containing property was subject to a lower maximum penalty than theft of a letter not containing property. Thirdly, to quote the Law Officers:

"we might instance a great many other provisions which appear to be ill-considered and objectionable, but the defects which we have pointed out make it clear that Her Majesty cannot properly be advised to assent".

Given the length and importance of the Bill, they suggested that a draft be returned to them before entering the legislature ¹.

Attorney General Gell did his best to advise the Lieutenant-Governor on the substantive issues raised by the Law Officers, and admitted drafting errors ². The Lieutenant-Governor was concerned by two points. Firstly, the Law Officers had hinted at a number of other defects in the Code, without actually detailing them. Secondly, there was some evidence that the Law Officers were unaware of the advice the Governor had received from the Home Office during drafting of the Bill. Both these factors influenced him when he arranged a conference between himself, the Attorney General and both British Law Officers, "so that the Bill may be presented to the Insular Legislature in the form that it would be approved by the Government" ³.

The conference, held in April of 1871 ⁴, addressed a number of important issues - principally related to the issues dealt with in 1868 ⁵. The Bill having been amended to meet the objections of the Law Officers, it was resubmitted for Assent ⁶. The Code was refused Assent once again,

¹A. Liddell of the Home Office to Lieutenant-Governor Loch, 28 December 1870 [Letterbooks 17,656].

²Attorney General Gell to Lieutenant-Governor Loch, 11 January 1871 [Letterbooks 18,37].

³Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 24 January 1871 [Letterbooks 18,107].

⁴This author has been unable to pinpoint the exact date, although it appears the meeting took place in the first or second week of the month.

⁵Also considered were a number of distinctive sections dealing with sheep-stealing. While the Lieutenant-Governor did not approve of them *per se*, he saw their inclusion as a necessary concession if the Code were to become law, and defended them on that ground.

⁶A. Liddell to Lieutenant-Governor Loch, 6 February 1871 [Letterbooks 18,164]; G.S. Leferne to Lieutenant-Governor Loch, 20 February 1871 [Letterbooks 18,284]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 30 March 1871 [Letterbooks 18,436]; A. Liddell to Lieutenant-Governor Loch, 3 April

and a lively correspondence resulted. Once again, the Post Office was dissatisfied with interaction between the proposed Code and the Imperial legislation ¹. The Post Office favoured striking out all the postal sections, but the Law Officers defended the right of the Insular legislature to produce a comprehensive Code containing provisions supplemental to Imperial statutes. The Law Officers further doubted whether the Imperial measure in question applied to the Isle of Man in its entirety. Eventually the Code was amended to meet the objections of the Post Office, and was again forwarded for Royal Assent ².

Once again, due to the objections of the Post Office, Assent was refused. By this time Lieutenant-Governor Loch, who went on to hold more prestigious posts within the British Empire ³, was running out of patience. He noted that the majority of the objections had "not been previously suggested by the legal advisers of the Post Office", and asked that the redrafted Code be considered by the Post Office once again. The Post Office required one further amendment, but the Lieutenant-Governor was assured that assent would then follow ⁴.

At the next attempt ⁵ the Code reached the Committee of the Privy Council, which refused to recommend Assent. The Law Officers report to the Committee raised a number of policy and drafting objections to the Code. The Lieutenant-Governor was clearly pushed beyond forbearance by this latest obstacle. He noted that this was the first time many of the points had been raised; that the conference held in 1871, which had been attended by one of the reporting Law Officers, had been ignored although it dealt with a number of the points; and that he had already been assured by the Law Officers that the Code, in its current form, would receive Assent. After defending each of the queried sections he concluded that, in all the

1871 [Letterbooks 18,450]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 29 May 1871 [Letterbooks 18,633].

¹Additionally, the proposed power of the Lieutenant-Governor to open letters was queried by the Home Office.

²A.Liddell to Lieutenant-Governor Loch, 12 July 1871 [Letterbooks 19,84]; Attorney General Gell to Lieutenant-Governor Loch, 24 July 1871 [Letterbooks 19,158]; Attorney General Gell to Lieutenant-Governor Loch, 3 August 1871 [Letterbooks 19,202]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 9 August 1871 [Letterbooks 19,231]; A.Liddell to Lieutenant-Governor Loch, 2 September 1871 [Letterbooks 19,270]; Lieutenant-Governor Loch to Home Office, 19 October 1871 [Letterbooks 19,402].

³Commissioner of Woods and Forests 1882-4; Governor of Victoria, 1884-1889; Governor of Cape of Good Hope and High Commissioner of South Africa, 1889-1895.

⁴A. Liddell to Lieutenant-Governor Loch, 6 January 1872 [Letterbooks 20,57]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 9 January 1872 [Letterbooks 20,69]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 4 January 1872 [Letterbooks 20,48a]; A. Liddell to Lieutenant-Governor Loch, 22 January 1872 [Letterbooks 20,104].

⁵Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 31 January 1872 [Letterbooks 20,153].

circumstances, he could not answer for the safe passage of the Insular Bill through the Manx legislature yet again. The Home Office responded with a request for one minor amendment, and the amended Bill received Royal Assent. The great Code of 1872 had finally become law¹.

The Code of 1872 was vastly more detailed than its predecessor. This was partly due to greater consideration of general principles of liability and procedure, though not even this Code could claim to be anything like comprehensive in those areas. It was more due to the verbose drafting style of the day - a style which had been copied from English statutes. A typical example is section 71 of the Code which provides

"every woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison, or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any other instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

The Code was "to a certain extent a codification of the English criminal law, a good number of the clauses taken from English Acts and also from recent Acts of Parliament"². Once again, the Code did not exclude customary law offences. One section in particular, however, suggests that their obsolescence was envisaged. By section 347 it was provided:

"Whosoever shall do any other act or thing (not hereinbefore or in any other unrepealed Act of Tynwald or bye-law made by the authority of an Act of Tynwald, specified or referred to or otherwise provided for by law) in contempt of God or religion, or in contempt of the Queen's Government, or against public justice, or against public trade, or against the public health, or to the disturbance of the public peace, or injurious to public morals, or outraging decency, shall be guilty of a misdemeanour".

Certainly, this writer is unaware of any prosecution for a customary offence after the passage of the Code. There is some evidence that, while the second Code was being discussed, the Attorney General was under the impression that only statutory offences could be successfully prosecuted, since in at least one case he strained, unsuccessfully, to find a statutory offence to deal with unacceptable behaviour prohibited under the English common law³.

¹A. Liddell to Lieutenant-Governor Loch, 4 March 1872 [Letterbooks 20,259]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 12 March 1872 [Letterbooks 20,259]; A. Liddell to Lieutenant-Governor Loch, 12 April 1872 [Letterbooks 20,349a]; Lieutenant-Governor Loch to Under-Secretary of State, Home Office, 9 May 1872 [Letterbooks 20,478].

²Lieutenant-Governor Loch, 1 November 1870 [P.R.O. - H.O. 45/9319/16550].

³See Attorney General Gell to Lieutenant-Governor Loch, 3 June 1869 [Letterbooks 15,429].

From inception the Code of 1872 was interpreted in the light of English case-law. The clearest, and most authoritative, example of this is the case of Frankland and Moore, heard before the Judicial Committee of the Privy Council, and discussed at length elsewhere ¹.

Later Developments.

There was considerable revision of the statutes relating to criminal law and procedure after 1872. This revision did not, generally, take the form of amendments to the Code of 1872. Instead, the bulk of the Code was repealed, and the areas dealt with by the Code dealt with individual statutes, almost invariably based on a similar English statute. Thus, the provisions of the Criminal Code relating to theft and similar offences against property were repealed and replaced with statutes based on the English Larceny and later Theft Acts ². The Code was dismembered. The only provisions of the Code which remain in effect today are those based on statutes which remain in force in England, such as *24 & 25 Vict. c.100*; and statutory formulations of English common law offences such as murder ³. In both cases, no convenient English statutory update is available.

A number of reasons can be put forward for this decline. Firstly, there was a tendency to adopt English statutes relating to criminal law ⁴. It was easier to do this if the statutes were allowed to stand alone, rather than fitted into the format of the Code of 1872. Secondly, there is little evidence that codification as an ethos was powerful in the Manx legal system. The prevalence of statutory offences sprang from practical problems in Manx law, as discussed above - problems which could as easily be solved by a bundle of statutes as by a single Code.

Interpreting the Code.

Given that the structure of Manx law is so different from that of English law, this raises a number of issues on the correct way to determine Manx law - in particular, on the correct way to interpret the Code. Four points can be drawn out.

Firstly, the Manx Code is not a complete Code, capable of standing alone without recourse to case-law and other pieces of legislation. This is particularly true of the general part of the criminal law, which is barely mentioned by the Code.

Secondly, because this is only a partial codification, older authorities and statutes can be relevant to understanding the meaning of particular sections. For this reason, it is important to

¹See p.79.

²See p.222.

³See p.204.

⁴See p.21.

be aware of the customary law, in particular, before the Code was passed. In the discussion of offences that follows, much historical material has been included to allow a full consideration of the meaning of the modern law. Similarly, as many of the sections of the Code have been taken from English models, a derivation table for the Code is included in the Appendices.

Thirdly, English authorities on particular sections of English legislation, where these sections were later adopted by the Code, can be of considerable importance. This issue is discussed more fully elsewhere ¹.

Fourthly, the Code is almost purely a code of offences - very little is said about what may be called the general part of the criminal law. It should be borne in mind, therefore, when considering criminal liability in the Island, that general principles are almost invariably taken from English law, and that differences are most likely to emerge in the definition of offences. Accordingly, the remainder of this Part, after the discussion of criminal procedure, is divided into such offences, and such discussion of the general part as there is occurs where relevant within specific offences.

Classification of Offences.

It is worth briefly discussing classification of offences. In the discussion that follows I have opted, partly to make recourse to English texts on criminal law easier, to classify offences by the nature of the interest they are generally regarded as seeking to protect. This is not an especially important practical division, however, and there remains a more significant division which can be of some practical importance.

In Manx law, as in English, there were traditionally three categories of offence - misdemeanour, felony, and treason. In Manx law this classification survives to the present day.

It is worth discussing the argument that, treason having been subsumed by misdemeanour, only felony and misdemeanour survive. By 1970, Tynwald had begun adopting English legislation referring to "offences" rather than felonies or misdemeanours ². The Manx statutes adopted the terminology, and so failed to determine the status of the offences. The solution

¹See p.21.

²A good example of this is the Sexual Offences Act 1967. The change in English legislative practice sprang from the effective abolition of the distinction in English law by 1967 c.58 s.1.

was to define misdemeanour as "any offence which is not a felony" ¹. This could be taken to mean that all statutes to which this clause applies were to be read as defining treason as a misdemeanour ², on the basis that a treason is an offence which is not a felony.

This literal reading would be flawed. First, it would have made the death sentence mandatory for a number of misdemeanours ³, while traditionally misdemeanour was punished by a lesser penalty. Second, this reading neglects the legislative history of the measure. There was no possibility of the offences in question being treasons, so the definition given served to deal with the area of uncertainty. The better view, therefore, is that any offence whose nature is not defined is misdemeanour, but that any statutory section purporting to create a treason or felony creates an offence of that nature. Thus, the tripartite distinction survives.

¹Criminal Law Act 1981 sch.7(1) amending Code 1872 s.422.

²In practice, all important criminal statutes.

³See Code 1872 s.422.

Chapter Eleven: Manx Criminal Procedure and Criminal Courts.

This chapter discusses a number of important aspects of Manx criminal procedure, in roughly the order in which a defendant might be expected to come across them. Thus, discussion begins with arrest and related issues, then moves on to trial and appeal. The discussion of the trial process becomes convoluted, partly through parallel discussion of summary trials, trial on information, and trial by indictment. But the issue is also complicated by the form of Manx law during the nineteenth century, whose complications culminated in a process where the most serious offences were first considered by justices (who might decide not to allow it to proceed), then a jury under the guidance of the Deemster (which exercised a similar power), and finally the trial jury proper. Older authorities only become clear if this background is understood.

Manx Criminal Procedure.

Arrest and Powers of Search.

As was recorded in 1577 , "no Officer may arrest any Man for debt, nor any other Cryme, but as the Deemster shall appoint by law and process" ¹. Thus, a core value of Manx law is that an officer or individual seeking to make an arrest or conduct a search is required to justify their actions.

Before the nineteenth century, a range of officers took responsibility for enforcing the criminal law, and arresting those who suspected of offences. The Lieutenant-Governor, Deemsters, Council, and fortress commanders ² were able to arrest for breach of the peace and other public order offences such as riot ³. Additionally, these officers could grant aid for the apprehension of delinquents or persons suspected of any capital crime ⁴. At Revestment the

¹Customary Laws 1577 s.18.

²Almost certainly including the Captains of the Parishes and Towns, later the High-Baliffs - consider Corlett [1806] L.S.; CRAINE D., Mannannans Isle, [Douglas] (1955) 63-93.

³See CAMDEN, Brittanica (1695) Manx Society 18,16; Clucas [1799] L.S.. See also Criminal Law Act 1737 s.(4) [o].

⁴Criminal Law Act 1737 s.(4) [o]. These powers were analogous to those of the English Conservators of the Peace - see STEPHEN J.F., op.cit., (1883) i.185-190.

most important Conservators in the Isle of Man were the Captains of the Towns since "the preservation of peace in the towns [rested] with the Captains" ¹.

The officers most directly concerned with arrest for serious offences were the Coroners. Coroners were empowered, and required, to arrest those suspected of treason or felony, or breach of the peace ². Analogous to the English law of hue and cry ³, a private individual could also be required to assist in an arrest ⁴. Otherwise, private individuals had a power to arrest suspected felons ⁵, but no power to arrest for misdemeanour ⁶.

Modern developments have seen, in particular, the removal of the Coroner from his central role in the criminal justice system ⁷. The principal duty for effecting arrests has passed to police constables, an office created in 1836 ⁸. The duties and succession of these officers closely followed the replacement of the constable by the police officer in England ⁹. The position of private individuals remained unchanged ¹⁰. In 1981 the law of summary arrest was reformed, along the English model, around the concept of the arrestable offence ¹¹.

As well as these summary powers, broader powers of arrest were available under warrant. By customary law the Governor, Deemster or other chief officer could issue a warrant for arrest in criminal matters ¹². This power was employed primarily to deal with misdemeanours ¹³. These warrants were normally executed by the Coroner ¹⁴. The customary law process was

¹Governor Wood, 10 December 1765 [H.O.99/16]; Order Concerning the Captain's Duties, 1769 L.S.; Minutes at the Council Chamber, 15 February 1766 [P.C. 1/8/8].

²Treason and Felony Act 1777 stating customary law in this area - Customary law 1422 s.50; Customary Law 1417 s.11; see also Begg [1418] Q.P.; M'Crayne [1511] Q.P.

³BRACTON H. de, *De Legibus et Consuetudinibus Angliae*, [London] (1942) 235-7.

⁴Corlett [1806] L.S.; Fitzsimons v Oates [1807] L.S..

⁵An implication of Criminal Law Act 1777 s.(4) [o] when read against the Coroner's inherent power to request aid from other officers to perform his duties.

⁶Criminal Law Act 1737 s.(1) [o].

⁷See R. Stonehewer to W. Sharpe, 22 October 1765 [P.R.O. - P.C. 1/7/172].

⁸Justices Act 1836 s.4 [o]; slight change in wording by Police Act 1962 s.15(4) (as amended by Police Amendment Act 1980 s.1); consider Gawn [1805] L.S. for the consequences of arrest without prosecution.

⁹STEPHEN J.F., *op.cit.*, (1883) i.195-200.

¹⁰See [1812] Manx Advertiser 14 March.

¹¹Criminal Law Act 1981 s.4 [1967/58/2].

¹²*Commissioners Report* (1792) 52; see Ray [1799] L.S..

¹³See Criminal Law Act 1737 s.1 [o]; see 1777 c.11 s.2 [o].

¹⁴*Commissioners Report* (1792) 52.

analogous to the English law relating to justices ¹, but may have allowed warrants for a wider range of offences ². Additionally, a warrant was occasionally issued in respect of a crime committed elsewhere in the British Isles ³. The first Code specifically allowed the Deemster to issue a warrant on suspicion of committing a misdemeanour ⁴. Since 1872 justices ⁵ have been responsible for issuance of warrants, as they have been in England for many centuries ⁶. Manx officials can also back foreign warrants for arrest ⁷.

Turning to powers of search, by customary law the Coroner ⁸, and his assistant the Lockman ⁹, possessed the power to search any person's house and "covert places" in order to find goods which had been feloniously taken away ¹⁰. With the replacement of the Coroner by the police constable the customary powers of search fell into disuse. Since 1872 police officers have been empowered to search for stolen goods without recourse to a judicial officer ¹¹. Additionally, since 1981 a constable exercising statutory powers of arrest has been entitled to exercise limited powers of search without warrant ¹². A number of statutes also empower

¹STEPHEN J.F., op.cit., (1883) i.190-2

²cf. HAWKINS W., A Treatise on the Pleas of the Crown, [London] (1726) 129-30.

³Warrant of the Duke of Atholl [1750] L.S.; Warrant for Arrest [1744] L.S..

⁴Code 1817 s.50. This section was based on the more specific provisions of the Forgery, Perjury and Cheating Act 1797 s.3, itself based on an English statute.

⁵Between 1864 and 1872 this jurisdiction existed alongside the process before justices. See Petty Sessions Act 1864 s.3(2),4(1),4(2) [1851/93/10;o;o]; Petty Sessions and Summary Jurisdiction Act 1927 s.10(1),13(1),13(2) [1851/93/10,11]; Justices Act 1836 s.2 [o]; Petty Sessions and Summary Jurisdiction Act 1927 s.38,39 [1924/58/27; 1925/86/44]; Summary Jurisdiction Act 1956 s.18(1)-(4) [1952/55/108(1)-(4)]; Summary Jurisdiction Act 1989 s.82 [1980/43/125]; *Corlett v Gawn* [1801] L.P..

⁶STEPHEN J.F., op.cit. (1883) i.190-2. See 11&12 Vict. c.42.

⁷See Home Secretary to Lieutenant-Governor Smelt, 18 July 1807 [Letterbooks 1,138]; [H.O. 45/114511/595106]; Petty Sessions Act 1864 s.15-17 [1851/93/29-31]; Petty Sessions and Summary Jurisdiction Act 1868 s.17 [o]. See the English 11&12 Vict. c.42 s.12-15, 55&56 Vict. c.55 s.475, 14&15 Vict. c.55 s.18; Petty Sessions and Summary Jurisdiction Act 1868 s.17 [o]; Petty Sessions and Summary Jurisdiction Act 1927 s.49 [o]; 44&45 Vict. c.69; *Callow to the Mayor of Liverpool*, 12 May 1786 [Letterbooks 1,91].

⁸Coroners Case [1566] Q.P.; *Crellins Case* [1676] L.P..

⁹*Gremshire* [1641] L.S.; *Corkill* [1674] L.P..

¹⁰PARR, 25.10; cf. CRAINE D., Mannannans Island, [Douglas] (1955) 57-62 which attributes a wider power to the Coroner.

¹¹Code 1872 s.235 [see 1871/112/16]; Larceny Act 1946 s.40 [1916/50/42]; Theft Act 1981 s.28 [1968/60/26].

¹²Criminal Law Act 1981 s.4(6) [1967/58/2(6)].

justices to issue search warrants ¹. The law in this area is indistinguishable from that in England before the Police and Criminal Evidence Act ².

Having been arrested, a defendant might be granted bail. By customary law the Governor could grant bail to those awaiting trial for public order offences and other notorious misdemeanours, as well as felonies ³. It is probable that this was one aspect of a broader power. In 1935 the Attorney General considered that, although no one had any express power to grant bail to an appellant to the Judicial Committee of the Privy Council, "I think His Excellency in the exercise of his general power could release him on bail pending the hearing of the appeal" ⁴. Unlike English law, which limited the discretion of the officer in granting bail by statute ⁵, no customary law prohibited or required bail in any particular case. In 1737, in a context which may suggest codification of the existing law, it was provided that no bail could be granted on a charge of murder, or assault upon one who was in mortal danger as a result ⁶. Today, rather than remain in custody awaiting trial, a defendant may be granted bail, the rules of which are based on English models ⁷.

Summary Trial.

¹Petty Sessions Act 1864 s.41 - similar to the English law (see *Jones v German* [1896] 2 QB 418); Petty Sessions and Summary Jurisdiction Act 1927 s.12 [o]; Larceny Act 1946 s.40 [1916/50/42]; Theft Act 1981 s.28 [1968/60/26]; Code 1872 s.400 [1861/96/103]; Criminal Damage Act 1981 s.6 [1971/48/6]; eg. Sheep Stealing Act 1857 s.1 [o]; Code 1872 s.286,311 [1861/98/46; 1861/99/27]; Criminal Code Amendment Act 1886 s.14 [1885/69/10]; Dangerous Drugs Act 1952 s.13,18 [1951/48/14,19]; Forgery Act 1952 s.15 [1913/27/16]; Drugs (Prevention of Misuse) Act 1965 s.2,3 [1964/64/2,3]; Dangerous Drugs Acts 1966 s.14,15 [1965/15/14,15]; Sexual Offences Act 1967 s.40-44 [1956/69/40-4; 1959/57/1(3); 1956/69/43]; Misuse of Drugs Act 1976 s.17,23,24 [1971/38/17,23,24].

²It should be noted that these powers were only to be used for the purposes for which they were given - *Clarke v Miller* (1993) 20 Manx L.B. 49. Additionally, it should be noted that elements of PACE are now entering Manx criminal law - see Criminal Justice (Intimate Body Searches) Act 1994.

³Implied from Criminal Law Act 1737 s.(2),(3),(4) [o].

⁴Opinion of Attorney General R.B. Moore, 1 April 1935 [H.O.45/16713/861967].

⁵See STEPHEN J.F., *op.cit.* (1883) i.234-9.

⁶Criminal Law Act 1737 s.(3) [o].

⁷Petty Sessions Act 1864 s.4(2) [1851/93/11]; HARRIS T., *Criminal Law*, [London] (1908) 322-3; Code 1817 s.50 [o]; Petty Sessions Act 1964 s.8(1) [1851/93/16(1)]; Petty Sessions Act 1864 s.8(2) [1851/93/16(2)]; 11&12 Vict. c.42 s.23.; Criminal Code Amendment Act 1886 s.25 [o]; Bail Act 1952; Admission to Bail Act 1908 s.2 [1879/49/38]; Petty Sessions and Summary Jurisdiction Act 1927 s.25 [1879/49/38]; augmented by Bail Act 1952 s.11,12 [o;1914/22;1922/45]; Summary Jurisdiction Act 1956 s.19 [1952/55/108]; Summary Jurisdiction Act 1989 s.83 [o].

Before 1864 the summary jurisdiction was very limited. The summary jurisdiction in treason ¹ was defunct by 1663 ². The only lesser offences were those of battery and provocation, created under the statute of 1661 ³, which were triable by Governor or Deemster without a jury or preliminary enquiry ⁴.

In 1836 the jurisdiction in battery, along with jurisdiction over some trading offences, was vested in the justices ⁵. This proved to be a preliminary step in expanding the jurisdiction. In 1864 the jurisdiction of the justices was increased by a statute based on English models ⁶. After that date the importance of the jurisdiction constantly increased. The law in this area is almost identical to English law ⁷.

Inquiry Into Offences Triable On Indictment or Information. ⁸

¹M'Issacke [1422] Q.P.; M'Christie [1422] Q.P.

²Christian [1663] L.S..

³Turf and Ling Act 1661 s.4 [o].

⁴Criminal Law Act 1736 s.(5); Caine and Callen [1663] L.S.. cf. the exceptional case of Knaikill [1670] L.S. where a Deemster tried a misdemeanour without a jury.

⁵Justices Act 1836 s.1,2,3,8 [o]. High Baliff's also exercised a jurisdiction analagous to that of the English stipendiary magistrate.

⁶See the discussion of the legislation effecting these changes stored in the Public Records Office [P.R.O. - H.O. 45/O.S. 7550].

⁷See Beret v Lemon [1863] Mona's Herald 30 December; Petty Sessions and Summary Jurisdiction Act 1927 s.56 [1851/92/2]; Petty Sessions and Summary Jurisdiction Act 1946 s.4; Criminal Law Act 1981 s.26 [o]; Criminal Code Amendment Act 1886 s.23 [o]; Uniforms Act 1895 s.4 [1894/45/4]; Vagrancy Act 1896 s.4 [o]; Summary Jurisdiction Act 1989 s.30 [o]; Petty Sessions Act 1864 s.3(1)-(4),18-21 [1851/93/10(1)-(4),36-39]; Petty Sessions Act 1900 s.27 [1879/49/39]; Petty Sessions and Summary Jurisdiction Act 1927 s.10(1)-(3),11,50-54 [1851/93/10(1)-(3),(4),o;o;o; 1925/86/32; 1851/93/39]; Criminal Law Act 1981 s.3 [o]; Summary Jurisdiction Act 1989 s.4,76,77 [1980/43/1;o;1980/43/123]; Kelly and Duff [1839] L.S.; Commissioner v Murton [1843] L.S.; Petty Sessions Act 1864 s.11(1) [1851/93/20(3)]; Petty Sessions and Summary Jurisdiction Act 1927 s.28 [1851/93/20]; Summary Jurisdiction Act 1986 s.1 [1980/43/12]; Summary Jurisdiction Act 1989 s.10,11,13,15 [1980/43/11,12; 1984/43/14,46]; Petty Sessions Act 1864 s.12 (amended by the Petty Sessions Act 1900 s.26); Petty Sessions and Summary Jurisdiction Act 1927 s.29 [1851/93/21]; Summary Jurisdiction Act 1989 s.8 [1980/43/9]; Summary Jurisdiction Act 1864 s.6 [1848/42/17,18]; Petty Sessions Act 1900 s.12-15,17 [1879/49/10-13,14]; Petty Sessions and Summary Jurisdiction Act 1927 s.34,35,36 [1879/49/10,11,24]; Petty Sessions and Summary Jurisdiction Act 1956 s.9,10; Summary Jurisdiction Act 1960 s.6; Criminal Law Act 1981 Sch.7; Summary Jurisdiction Act 1989 s.5,16,18,19 [o;o;o;1980/43/24(1)]; Criminal Justice Act 1951 s.12; Summary Jurisdiction Act 1989 s.17 [o].

⁸After 1981 called the "preliminary enquiry" (Criminal Law Act 1981 s.19).

By customary law a prosecution for felony could be initiated by the Attorney General on behalf of the Crown, or by a private individual ¹. Private individuals were also able to initiate prosecutions for most misdemeanours ². Misdemeanours could also be presented by the Great Enquest, lesser juries, or the Moar, although there is no doubt that a private individual could bring offences to their attention.

Accusations of treason or felony were generally ³ considered by a six man jury under the direction of a Deemster ⁴. After hearing the evidence and submissions of both advocates, they were to indicate whether the prosecution ought to be continued ⁵, either by formal indictment, or by verbal presentment. The terms were used interchangeably, sometimes even within the same document, which could begin with a jury presenting a defendant, and conclude with their indicting him for a specific offence. Other juries, such as those inquiring into a death ⁶ or petty larceny, could also act as juries of indictment.

At customary law these indictments were subject to a number of formal requirements. If these requirements were not met it was the duty of the Deemster and Keys to intervene and stop the arraignment ⁷. The importance of form in the indictment can also be seen in English law ⁸. The formal requirements were as follows. First, all indictments and informations were to be lodged with the Clerk of the Rolls ⁹. An implication of this rule was that the indictment or presentment had to be in writing ¹⁰, as in England ¹¹. Second, all indictments were to be brought by named jurors. Third, the indictment was to accuse a named defendant of a specific offence triable on indictment ¹². English law had the same requirements ¹. Fourth, the

¹See Customary Laws 1577 s.10; PARR, 50.11. The normal procedure was for the individual to pledge to the Coroner by "handsuit" (taking him by the hand) that he would prosecute the case. The Coroner would then call a jury of indictment - see Commissioners Report (1792) 45-7.

²See Wood v Fitzsimons [1807] L.S..

³cp. Trespass and Petty Larceny Act 1748 s.3 [o]; Trespass and Petty Larceny Act 1753 s.1 [o].

⁴At one point, possibly because of their wealth and lack of sympathy with the typical defendant, the jury of indictment was chosen from the Keys - see Carrett [1616] L.S.. This was exceptional.

⁵Treason and Felony Act 1777 [o].

⁶Harward [1650] L.S.; Re Redgate [1559] Q.P..

⁷Shimmin [1691] L.P..

⁸See Williams Case (1790) 1 Leach. for a good example.

⁹See Abbott of Rushen [1519] Q.P..

¹⁰In the case of presentment, it was reduced to writing after having been orally delivered to the jury.

¹¹STEPHEN J.F., op.cit., (1883) i.274-5.

¹²Consider Petty Larceny Case [1566] Q.P.; Martin [1642] L.P.; Trespass and Petty Larceny Act 1748 s.3 [o]; Trespass and Petty Larceny Act 1753 s.1 [o]; Treason and Felony Act 1777 [o].

indictment was required to clearly set out all the ingredients of the offence to be proved. For instance, a charge of theft stated what was stolen, to whom it belonged, or that it belonged to a person unknown, when and from where it was stolen, and that it was "stolen, taken and carried away". English law had similar requirements ².

A number of factors were not required formalities, but should be discussed briefly. Firstly, all legal records were required to be written in normal script, but no language requirement existed. Earlier indictments used Latin, but by 1724 use of English predominated ³. From the handwriting of surviving records, it appears that personal taste played an important part in determining which language was used ⁴. By the nineteenth century all records were in English. This remained mere practice however, and unlike English law, no particular language was required by law ⁵. Secondly, the indictment could contain a number of specific allegations of separate offences ⁶ committed against different persons at different times ⁷. English law was the same, but appears to have restricted combinations of offences more than Manx law ⁸. Thirdly, the small scale of the jurisdiction rendered the English law relating to venue ⁹ irrelevant. Fourthly, once the indictment had been found it remained valid in perpetuity, and could be used to arraign a defendant at any time ¹⁰.

After Revestment this area of law remained distinctive. The identity of the prosecutor ¹¹, and the process by which complaints were heard, both merit discussion ¹².

¹STEPHEN J.F., op.cit., (1883) i.280.

²*ibid*, i.280-2

³See, for instance, Wilkes [1723] L.P..

⁴See for instance, Davies [1746] L.P.; Bridson [1746] L.P.; Gellin [1747] L.P..

⁵See 4 Geo.2 c.26.

⁶See Kinread & Comaish [1823] L.P..

⁷Felon's Case [1623] L.P.; Martin [1642] L.S.; Kissag [1693] L.P.; Goldsmith [1731] L.P.. There are examples of multiple indictments being found against the same person at the same session - see Commish [1675] L.P.; Lowney [1684] L.P..

⁸STEPHEN J.F., op.cit., (1883) i.291-2.

⁹STEPHEN J.F., op.cit., (1883) i.276-280.

¹⁰Felon's Case [1691] L.S..

¹¹ For a review of the current prosecution system, see COUNCIL OF MINISTERS, Third Interim Report on Future Constitutional Objectives, [Douglas] (1995) para.5.1-6, 7.4.

¹²Limitation of action by time, although of less interest, was also distinctive - see Treason and Felony Act 1777 [o]; Trespass and Petty Larceny Act 1748 s.3 [o]; Trespass and Petty Larceny Act 1753 s.1 [o]. Code 1817 s.51 [o]. This was inherited from the 1797 Act. See Code 1872 s.372 [o].

The Code of 1817 provided that all treasons and felonies were to be prosecuted by the Attorney-General on behalf of the Sovereign ¹, while misdemeanours could be prosecuted by the Attorney-General, or by a private prosecutor ². After 1832 such private prosecutors were required to show cause why an order for the trial of the accused should be granted ³. In 1872 a more complex structure was created, which gave the Attorney General an effective veto power over private prosecutions, which could be brought only for a limited range of offences. Even this limited role was later removed, and the private prosecutor excluded from trial on information ⁴. This contrasted radically with English law which allowed private prosecution for treasons, felonies and misdemeanours.

The law concerning hearing of the complaint was unusually complex. Before 1864 misdemeanours were not the subject of a preliminary hearing ⁵. Between that year and 1981 all charges on information or indictment were subject to a preliminary hearing. After 1981, however, a summary court was able to commit the offender for trial without a preliminary hearing ⁶. These provisions were identical to the English law in this area, although misdemeanours became subject to preliminary enquiry in English law as early as 1826 ⁷. Hearing of the complaint could be by justices, a jury of inquiry, or both, depending upon the date and circumstances.

Hearing of the complaint by justices dates from 1864, as opposed to 1554 in England ⁸. From that date a justice made a preliminary enquiry in all cases of misdemeanour, felony and treason. The accused was then either discharged or, if "evidence [was] sufficient for ... committal, or if such evidence [raised] a strong or probable presumption of guilt" committed

¹Code 1817 s.4 [o]; See Home Office to Lieutenant-Governor, 12 June 1813; Lieutenant-Governor to Home Office, 20 July 1813; Lieutenant-Governor to Home Office, 13 August 1813; Attorney-General to Home Office, 16 April 1817 [All in P.R.O. - H.O. 98/68].

²Code 1817 s.50 [o].

³Criminal Law Amendment Act 1832 s.11 [o].

⁴Code 1872 s.371 [o]; Code 1872 s.358,371 [o]; see Lieutenant-Governor to Home Office, 4 November 1892 [P.R.O. - H.O. 45/9862/B13330]; Code 1872 s.359 [o]; Criminal Code (Amendment) Act 1921 s.6 [o].

⁵Code 1817 s.50 [o].

⁶Criminal Law Act 1981 s.19, Sch.5 [1967/80/1,2,89]. See Criminal Law Act 1985 s.5; Summary Jurisdiction Act 1989 s.70-71 [o].

⁷Geo.4 c.62 s.2,3; 11&12 Vict. c.42.

⁸See 1&2 Ph.&M. c.13 which may have legalised an existing practice - see STEPHEN J.F., *op.cit.* (1883), i.219.

to the next stage of the enquiry ¹. As could be anticipated from an officer and procedure adopted from a well-developed English structure, the law in this area was identical to that in England.

Turning to hearing of the complaint by juries, Manx law was more individualistic. The first Code effected no substantial change in the procedure established in 1777 ². Before 1872 accusations of treason or felony were usually ³ considered by a six man jury under the direction of a Deemster ⁴. After hearing the evidence and submissions of both advocates, they were to deliver a verdict to the presiding officer as to whether or not the prosecution should be continued ⁵. At one point it was proposed that the Keys should take on this duty of inquiry, but this was rejected by them as "incompatible with their position as one branch of the insular legislature" ⁶.

The Code of 1872 complicated this procedure. Treasons, felonies and some misdemeanours to be tried in the Court of General Gaol Delivery required the preliminary finding of an indictment ⁷ - other offences were prosecuted on information and did not require an indictment.

Indictments were found by preliminary enquiry by a six member jury under the Deemster, assisted by the Attorney-General ⁸. This jury of enquiry was, appearances apart, profoundly different from the English Grand Jury. The jury of enquiry sat and listened to all the evidence,

¹Petty Sessions Act 1864 s.3,6(1),6(2),7(1) [o;1848/42/17,18;1848/42/25]; Criminal Code Amendment Act 1892 s.12 [o]; Petty Sessions and Summary Jurisdiction Act 1892 s.12 [o]; Petty Sessions and Summary Jurisdiction Act 1927 s.10,16(1),(3),18 [o;1848/42/17; 1925/86/12(2)-(5);1848/42/25]; Petty Sessions and Summary Jurisdiction Act 1927 s.18; Summary Jurisdiction Act 1989 s.6 [1980/43/6].

²See p.178.

³cp. Trespass and Petty Larceny Act 1748 s.3 [o]; Trespass and Petty Larceny Act 1753 s.1 [o]; Code 1817 s.27 [o]; Lieutenant-Governor Walpole to Deemster Drinkwater, 5 December 1892 [M.M.A.]; Attorney General Clarke to Hobhouse, 4 October 1826 [M.M.A. - G.O. 4/19]; Coole v Broadfoot [1842] Mona's Herald 9 March; Harward [1650] L.S.; Re Redgate [1559] Q.P..

⁴At one point, possibly because of their wealth and lack of sympathy with the typical defendant, the jury of indictment was chosen from the Keys - see Carrett [1616] L.S.. This was exceptional.

⁵Treason and Felony Act 1777 [o]; Code 1817 s.48 [o]. This was a complex process - see Roberts [1878]; Kelly [1889].

⁶See J.Mann to Lieutenant-Governor Hope, 11 April 1857 [M.M.A. - G.O. 67/92], 23 April 1857 [M.M.A. - G.O. 67/93]; Draft letter from Lieutenant-Governor Hope to the Keys, c.1857 [M.M.A. - G.O. 67/95].

⁷A simplification of the statute - see Code 1872 s.358,359,364,371 [o].

⁸Code 1872 s.360-2 [o]. See also Code 1872 s.370 [o].

cross-examination of the witnesses, the speeches of prosecution and defence, and the summing up of the Deemster ¹. After the hearing was complete the jury decided whether sufficient evidence existed to commit him for trial before the Court of General Gaol Delivery. The English Grand Jury on the other hand, from an early date, made the indictment on the basis of far less evidence, and the process appeared to develop into a mere formality ².

The law in this area was greatly simplified in 1918 when it was provided that all offences triable in the Court of General Gaol Delivery should be enquired into by a justice ³, and an information preferred by the Attorney-General on the basis of the evidence before the justice, as well as any other evidence available ⁴. The information could take into account evidence not placed before the Justices ⁵ and, after 1969, bring charges in addition to, or instead of, the charge for which the accused was committed ⁶. Since 1921 trial on information has been the only non-summary mode of prosecution ⁷.

During preliminary enquiry the justices ⁸, and the Deemster presiding over an indictment jury ⁹, had power to grant bail ¹⁰.

Indictment Trial and Trial on Information.

By customary law, treasons and felonies were tried before a twelve member jury in the Court of General Gaol Delivery. There were three exceptions to this rule. In some cases those accused of treason were not entitled to any trial at all and were summarily punished ¹¹. Secondly, Tynwald Court retained a general jurisdiction which was exercised in particular

¹See the Attorney General's speech on the debate over the Criminal Code Amendment Act 1917 - Council May 8, 1917; Criminal Code Amendment Bill 1917 (8 May 1917 (Council: Debates 34,60)); JOHNSON J., Jurisprudence of the Isle of Man, [Douglas] (1811) 61.

²STEPHEN J.F., op.cit., (1883) i. 250-274.

³Criminal Code Amendment Act 1918 s.3, 4(2) [o].

⁴Criminal Code Amendment Act 1918 s.4 [o].

⁵Criminal Code Amendment Act 1918 s.4 [o].

⁶Criminal Law Act 1969 s.1.

⁷See Criminal Jurisdiction Act 1993 s.2-5.

⁸Petty Sessions Act 1864 s.6,7 [1848/42/17,18; 1848/42/25]; Petty Sessions Act 1900 s.24 [1879/49/24]; Petty Sessions and Summary Jurisdiction Act 1927 s.16,19,24,32 [1848/42/17; 1925/86/12;o;o;1879/49/27]; Petty Sessions and Summary Jurisdiction Act 1952 s.3 [o]; Summary Jurisdiction Act 1989 s.84,85,86 [1952/55/105-6; 1980/43/131].

⁹Treason and Felony Act 1777; Code 1872 s.361 (see Isle of Man Judicature Act 1883 s.2), s.362 [o].

¹⁰See Felon's Case [1624] L.S.; Petty Sessions Act 1864 s.6(1) [1851/93/4]; Petty Sessions and Summary Jurisdiction Act 1927 s.16 [1851/93/14]; Criminal Law Act 1981 s.28 [1972/71/45].

¹¹Defunct by the time of Christian [1662] L.P..

when a member of Tynwald Court was to be tried ¹. Finally, if an indicted offender absconded before trial at the Court of General Gaol Delivery, which met bi-annually, he could be tried in the Exchequer Court, which met as required ². Apart from summary trial for treason, and trial in the Exchequer Court, these hearings were analogous to processes in England ³.

Different misdemeanours were tried in different ways. Blood wipes were presented at the Sheading Court by the Moar, and determined there by a jury ⁴. During the lifetime of the Great Enquest many misdemeanours were presented by that body to the Court of General Gaol Delivery, later to the Sheading Court, for punishment without further investigation ⁵. Remaining misdemeanours were tried before the Exchequer Court which had the option of employing a jury ⁶, although special statutory proceedings were created for statutory misdemeanours such as petty larceny ⁷.

In early customary law pleading to a charge was not always necessary, as an indicted felon could be tried in order to confiscate his goods even if he were absent ⁸ or dead ⁹. From the middle of the seventeenth century this solution was replaced entirely by the outlawing, as in England, of those who refused to come to trial when called ¹⁰. By customary law, a defendant actually arraigned on a charge of treason or felony was, if mentally capable of pleading ¹¹, required to plead upon pain of forfeiting the right to trial ¹². Having refused to plead, the defendant could only receive trial by the Lord's special grace ¹³. Compared with English law, Manx customary law was relatively liberal. In England those who stood mute from malice on

¹See the report of Tynwald Day proceedings in "The Acts of Sir John Stanley", (1418) Manx Society 3,70 at 72.

²See p.189.

³See STEPHEN J.F., op.cit., (1883) i.97-111 (assizes), i.161-5 (House of Lords).

⁴PARR, 19.01.

⁵See KERMODE R.B., "Juries in the Isle of Man", (1948) I.O.M.N.H.A.S. (P.) 5,100; CRAINE D., "The Great Enquest in the Seventeenth and Eighteenth Century", (1956) I.O.M.N.H.A.S. (P.) 5,241. A good summary of their traditional duties can be found in their oath of office - see Customary Laws 1577 s.1-14.

⁶After 1736 juries were compulsory in criminal cases - see Criminal Law Act 1736 s.1.

⁷See p.190.

⁸Felon's Case [1519] Q.P..

⁹cp. Dead Felon's Case [1519] Q.P.; Dead Felon's Case [1587] L.P..

¹⁰Clague [1647] L.S.; Cowley [1700] L.P.; Waterson [1733] L.P.; Waterson [1741] L.P.; see also Christian [1723] L.P.. Customary Laws 1422 s.1,3,9.

¹¹Callister [1836] L.P.; Cowley [1833] L.P..

¹²This is the best explanation for the difference between Stoale [1513] Q.P.; Felon's Case [1609] L.S.; and Christian [1663] L.S..

¹³Christian [1663] L.S..

a charge of treason or misdemeanour were taken to have pleaded guilty as in Manx law. If the offence were felony however the accused was to be pressed until he pleaded or died ¹. It was not until 1772 that English law adopted a form similar to the Manx ².

Generally, a defendant could be convicted only of the offence charged. A number of special exceptions applied to this rule, similar to English exceptions to the rule ³.

Between conviction and sentence could lie a considerable delay. Before 1739 misdemeanours were sentenced at the Exchequer Court, but it is probable that no power of detention awaiting such sentence existed ⁴. By customary law even those sentenced to death could be granted bail, as there were instances of felons who had put themselves to the Lord's mercy being granted bail awaiting his will ⁵.

After Revestment, the detail of the indictment trial changed, although the principal changes flowed from the changes in court structure and preliminary enquiry discussed above.

With the exclusion of the Keys from the Court of General Gaol Delivery ⁶, scrutiny of indictments fell to the Deemster alone ⁷. After 1872 considerable alterations to the rules governing the indictment were made by statute ⁸. In 1920, after the demise of the indictment, a

¹STEPHEN J.F., op.cit., (1883) i.297-301.

²12 Geo.3 c.20.

³Stanley [1649] L.P.; Howland [1819] L.P.; Sanefield [1839] L.P.; Stephen [1642] L.P.; Quayle [1736] L.P.; Keaton v Shelly [1812] L.P.; Code 1872 s.40,82,83,166,210,381,230,15 [1861/100/25;o;o;1861/96/41;1861/96/72;1861/96/88;o; 1861/96/94; 1848/12/7]; Infanticide and Infant Life Preservation Act 1938 s.4 [1929/34/2]; Code 1872 s.380 [o]; Criminal Code Amendment Act 1892 s.11 [o]; Criminal Justice Act 1953 s.5 [1891/100/9]; Criminal Law Act 1981 s.10(3),(4) [1967/58/6(3),(4)].

⁴See preamble to Sentences Act 1739 s.1 [o].

⁵See Quine v Kelly [1630] L.P. where such release was granted even in the absence of bail.

⁶See p.189.

⁷See Kelly [1824] Rising Sun 1 June.

⁸Code 1872 s.10,21,209,229,328 [1848/12/5;1861/100/6;1861/96/7;1861/96/93;o]; Code 1872 s.388,389,390,414 [1826/64/14;o;o]; Forgery Act 1952 s.16(2) [1913/27/17(2)]; Perjury Act 1952 s.9 [1911/6/12]; Criminal Code Amendment Act 1892 s.8,9 [o]; Code 1872 s.378 [1826/64/19]; Code 1872 s.379,383 [1851/100/1,25].

new set of statutory rules were introduced ¹, based on the English statutes relating to indictments ².

Turning to the actual trial ³, an important difference concerned counsel. Under Manx law, the defendant on a charge of felony in the Court of General Gaol Delivery was permitted to make their defence personally, or through counsel ⁴. English defendants were not permitted such representation by right until 1836 ⁵.

The position with regard to jury trial of misdemeanour before 1872 is more difficult to state. Most misdemeanours were originally tried before the Exchequer Court which had the option of employing a jury ⁶, although special statutory proceedings were created for statutory misdemeanours such as petty larceny ⁷. Later the Deemster and a six member jury dealt with misdemeanour.

In 1872 two distinct methods of trial were instigated ⁸. The mandatory method for the most serious offences was trial on indictment in the Court of General Gaol Delivery before a twelve member jury ⁹. Other offences could, before 1921, be tried on information before a Deemster and six jurors ¹⁰. After 1921 all non-summary offences were tried by the Court of General Gaol Delivery, analogously to the English Crown Court ¹¹.

Turning to pleading, after 1839 the practice grew up of allowing a defendant to plead guilty to an offence other than that charged. ¹². In 1872 it was provided that refusal to plead, or evasive

¹Code 1872 s.390,392 remained in effect; Criminal Code (Information) Act 1920 s.3(1),(2) [1915/90/3(1),(3)]; Criminal Code (Information) Act 1920 s.4,5 [1915/90/4,5]; Criminal Code (Information) Act 1920 s.5(1),(2) [1915/90/5(1),(2)]; Criminal Code (Information) Act 1920 s.1,2,Sch.1 [1915/90/1,2,Sch.1].

²See Criminal Jurisdiction Act 1993 s.2-6.

³Treason and Felony Act 1777 [o]; Code 1817 s.48 [o].

⁴BULLOCK H.A., History of the Isle of Man, [London] (1816); JOHNSON J., Jurisprudence of the Isle of Man, [Edinburgh] (1811) 61; CLARKE J., A View of the Principal Courts of the Isle of Man, [Liverpool] (1817) 45.

⁵6&7 Will.4 c.114, but see COCKBURN J.S., A History of the English Assizes 1588-1714, [London] (1972) 121-2.

⁶After 1736 juries were theoretically compulsory in criminal case - see Criminal Law Act 1736 s.1.

⁷See p.218, 222.

⁸See p.181.

⁹Code 1872 s.366 [o].

¹⁰Criminal Code Amendment Act 1921 s.6 [o].

¹¹See Courts Act 1971.

¹²Sanefield [1839] L.P.; Hamilton [1838] L.P.; Criminal Law Act 1981 s.10(6) [1967/58/6(5)].

pleading, resulted in the entry of a not guilty plea ¹. Generally, a defendant could be convicted only of the offence charged. A number of special exceptions applied to this rule, similar to English exceptions to the rule ².

No general power to grant bail during trial on indictment or on information existed by statute, although the Lieutenant-Governor did possess a wide power to grant bail ³. Between conviction and sentence, however, could lie a considerable delay. This problem was especially acute between 1817 and 1872, when misdemeanours were not sentenced at the court where the defendant was convicted, but at the annual exchequer court ⁴. Between 1832 and 1872 bail awaiting sentence could be granted ⁵.

Appeal ⁶.

The Lord of the Isle of Man could be appealed to by those convicted of a criminal offence, but this appeal was more an appeal to mercy than a judicial hearing. By customary law the final appeal lay to the Privy Council, and such appeals were strictly limited ⁷. The general principles of Imperial law governed such appeals ⁸. It should be stressed that the procedure whereby the Keys reviewed the verdict of any jury in a Court of General Gaol Delivery ⁹ did not provide for the reversal of an erroneous verdict. In this section we will briefly consider the growth in avenues of appeal from the criminal courts, dealing with the courts of summary jurisdiction, the Court of General Gaol Delivery, and the Deemster's Court.

¹Code 1872 s.385-7 [o;o;1826/64/14]; Criminal Law Amendment Act 1981 s.10(1) [1967/58/6]. See also Criminal Law Act 1981 s.11 [1967/80/12].

²Stanley [1649] L.P.; Howland [1819] L.P.; Sanefield [1839] L.P.; Stephen [1642] L.P.; Quayle [1736] L.P.; Keaton v Shelly [1812] L.P.; Code 1872 s.40,82,83,166,210,381,230,15 [1861/100/25;o;o;1861/96/41;1861/96/72;1861/96/88;o; 1861/96/94; 1848/12/7]; Infanticide and Infant Life Preservation Act 1938 s.4 [1929/34/2]; Code 1872 s.380 [o]; Criminal Code Amendment Act 1892 s.11 [o]; Criminal Justice Act 1953 s.5 [1891/100/9]; Criminal Law Act 1981 s.10(3),(4) [1967/58/6(3),(4)]; Criminal Jurisdiction Act 1993 s.7-10.

³See p.176.

⁴See Sentences Act 1739 s.1 [o]; Code 1817 s.58 [o]; Code 1872 s.367 [o].

⁵Criminal Law Amendment Act 1832 s.12 [o].

⁶Not considered in this section is the procedure for appeal against misdemeanours considered in the Sheading Courts - primarily bloodwipes. See on this Quayle v Bridson [1720] L.S.. For limits on the Keys jurisdiction see Christian [1720] L.S..

⁷Kelly [1824] L.P.; Christian (1662) discussed at p.41; Christian v Corren (1716) 1 P.Wms. 329.

⁸See ROBERTS-WRAY K., Commonwealth and Colonial Law, [London] (1966) 433-63.

⁹Keys Case [1794] L.S.; Kewley [1715] L.P.; Carran [1664] L.P.B..

From the creation of the extended summary jurisdiction until 1868 a party who objected to the finding of a Summary Court could appeal to the Staff of Government ¹. After 1868 appeal, originally to the Staff of Government but later to the High Court generally ², followed ³ a procedure created in accord with English statutes ⁴. After 1988, as in England, courts of summary jurisdiction were able to re-open a case in order to rectify a mistake so long as this was done by a similarly constituted court within 28 days ⁵. Additionally, review of the conduct of a magistrate could follow from a petition of doleance ⁶.

In 1921 the Court of Criminal Appeal was formed, with a jurisdiction similar to the English court upon which it was based ⁷. In 1969 this jurisdiction was amended in line with English developments ⁸. Additionally, after 1925 the trial judge in the Court of General Gaol Delivery was empowered to reserve questions of law for higher courts in the manner discussed below ⁹.

From 1872 until the demise of the Deemsters criminal jurisdictions, a conviction could be reversed, in case of error of law, by petition to the appeal court ¹⁰. Additionally, the Deemster could, after conviction, reserve any question of law which arose during the trial for the consideration and determination of the appeal court; a procedure similar to that in English law ¹¹. While formally laid down in 1872, this practice had already developed informally. In 1831, for example, Deemster Heyward adjourned a trial to consider admissibility of evidence. He

¹Some restrictions applied - see Summary Jurisdiction Act 1864 s.19 [1851/92/3]; Justices Act 1836 s.7 [o]; Petty Sessions Act 1864 s.14 [1851/93/24].

²Summary Jurisdiction Act 1989 s.103,105-110 [o;o;1980/43/111;o].

³See Queensberry [1976] Law Society Library; Creer [1986] Law Society Library; M'Dowell [1985] Law Society Library; Matthews [1978] Law Society Library; Perry [1965] Law Society Library.

⁴Petty Sessions and Summary Jurisdiction Act 1868 s.10,12,13,14 [1857/43/2,4,5;o]; Petty Sessions and Summary Jurisdiction Act 1927 s.43-47 [1879/49/19; 1925/86/20,25;o]. For a more detailed discussion see Petty Sessions Act 1864 s.14 [1851/93/24]; Summary Jurisdiction Act 1864 s.19 [1851/92/23]; Petty Sessions and Summary Jurisdiction Act 1956 s.1 [1952/55/83]; Summary Jurisdiction Act 1956 s.2 [1933/38/1]; Jopson v Gale [1961-71] Manx L.R. 72; Callin v Fargher [1961-1971] Manx L.R. 271.

⁵Summary Jurisdiction Act 1988 s.4 [1980/43/142]; see also Criminal Justice Act 1963 s.26(1) [o]; Summary Jurisdiction Act 1989 s.33 [o].

⁶See *Witchell v Oake* (1990) 15 Manx L.B., M'LEAN E., "Petitions of Doleance", (1984) 3 Manx L.B. 50.

⁷Criminal Code (Amendment) Act 1921 s.11,12 [1907/23/3,4]; *Quirk v Turnbull* [1961-1971] Manx L.R. 227.

⁸Criminal Appeal Act 1969 s.1,5,8,9,12,13 [1966/31/1; 1964/43/1; 1966/31/5;o; 1948/58/38(6)]; *M'Dowell v Teare* [1987-9] Manx L.R. 286; Criminal Jurisdiction Act 1993 s.30-45.

⁹Criminal Law Act 1925 s.6 [o].

¹⁰Code 1872 s.374 [o]; Isle of Man Judicature Act 1883 s.28 [o].

¹¹Code 1872 s.375 [1848/78/1].

consulted the Council, and decided that the evidence could be admitted ¹. In 1925, after the demise of this Court, the responsibility for hearing reserved cases was transferred to the body hearing appeals from the Court of General Gaol Delivery ². The appeal by error of law appears similar to the English writ of error issued by the Queen's Bench Division. The reservation of cases dated in English law from before 1848 ³, but seems to have been formally brought into Manx law for the first time in 1872.

After 1921, as in England, the Court of Criminal Appeal and its successor were empowered to admit an appellant to bail pending the determination of their appeal ⁴.

Manx Criminal Courts.

The Royal Courts.

It is important to bear in mind during the following discussion, that the Royal courts were often only formally distinct. In many cases the personnel of the courts were identical. The officers would meet as one court to conduct one type of business, then adjourn and reform as a different court in order to conduct another type. Attorney General Gell, writing in 1882, described the situation in terms applicable to this period:

“Our principal Courts, however, altho' nominally distinct in name and procedure are all virtually presided over by the same judges who have therefore to be well versed in the principles of both law and equity” ⁵.

The principal criminal court was the Court of General Gaol Delivery ⁶. The role of this Court was analogous to the English Court of Assizes exercising the writ of General Gaol Delivery ⁷. Its constitution, however, was unique to the Isle of Man, and worthy of detailed discussion.

First, the jury of life and death. These twelve jurors determined the guilt or innocence of the defendant ⁸. After the seventeenth century they acted as judges of fact ⁹. Second, the

¹See *Boscow v Christian* [1831] Manx Sun 4 October, Manx Sun 11 October.

²Criminal Law Act 1925 s.6 [o]; Criminal Appeal Act 1969 s.1 [1966/3/1]; Criminal Justice Act 1991 s.24-6.

³The date at which it was placed on a formal footing - see STEPHEN J.F., *op.cit.*, (1883) i.311-2.

⁴Criminal Code (Amendment) Act 1921 s.21(2) [1907/23/14(2)].

⁵Attorney General Gell to Lieutenant-Governor Walpole, 25 November 1882 [Letterbooks 38,601].

⁶PARR, 32.01. The Court sat in May and October, after the Sheading Courts. Often the courts were called without any felony being tried - see the eight consecutive courts between 1750-4, and 12 between 1758-1763.

⁷As well as trying traitors and felons, the Great Enquest originally made presentment here, and recognisances of the peace were called.

⁸CHALONER J., *A Short Treatise on the Isle of Man* (1656) *Manx Society* 10,1 at 36; *Commissioners Report* (1792) 45-7; Treasons and Felonies Act 1777 [o].

⁹See MOORE R.B., "Juries in the Isle of Man", (1956) *I.O.M.N.H.A.S. (P.)* 5,100.

Governor. By customary law the Governor was empowered to hold all courts ¹, and acted as sole judge ². Occasionally, the Governor was absent from the Court but this was exceptional ³. Third, the Deemsters. The Deemsters were, at customary law, assessors of law rather than judges ⁴. It is clear, from the rules regulating sentencing that their presence was assumed ⁵. Fourth, the Council. The Governor customarily summoned members of the Council to assist him in the Court ⁶. Fifth, the Keys, who sat in the Court to aid the Deemster in deciding difficult points of law, and review the verdict of the jury with a view to presentment if they entered an erroneous verdict ⁷.

The next most important criminal courts were the Debet and Exchequer Courts. By customary law the Debet Court was held after Michelmas in each year ⁸. The Court assessed the fines payable upon the findings of all the Courts during the year, both Royal and Baronial ⁹. The use of a separate court to perform this function was distinctively Manx. Although at the start of the eighteenth century the nature of this Court as a distinct entity was recognised ¹⁰, this status was lost during that century. In 1736 a statute providing for the earlier sentencing of those liable to corporal punishment for misdemeanour referred to "the annual Exchequer or Debet Court" ¹¹. The Commissioners Report of 1792, regarded by the Privy Council as "of very good authority" ¹² does not mention this court ¹³. Accordingly, it appears that this Court

¹Customary Laws 1422 s.13.

²Attorney General Gell suggested that the Common Law Court was presided over by the Lieutenant-Governor, but that the Deemsters, Clerk of the Rolls and Waterbaliff were also judges. He did not accept the view stated in the text, and argued that the Court of General Gaol Delivery was also made up in this way. Against that, Gell is in the minority on this point, and during this period the composition of the Court of General Gaol Delivery was far closer to that of Tynwald than of the Common Law Courts. See Attorney General Gell to Lieutenant-Governor Walpole, 25 November 1882 [Letterbooks 38,601].

³See Courts in 1497 and 1680.

⁴See CLARKE J., A View of the Principal Courts of the Isle of Man, [Liverpool] (1817).

⁵See Declaration of 1663 L.S.; Craine [1517] Q.P..

⁶A.W. MOORE, 749. See ASHLEY A., op.cit., (1956).

⁷These functions are more fully discussed at p.238.

⁸PARR, 34.23.

⁹CHALONER J., A Short Treatise on the Isle of Man (1636) Manx Society 10,1 at 41.

¹⁰SACHAVERELL W., An Account of the Isle of Man (1702) Manx Society 1,1 at 74.

¹¹Sentences Act 1739 preamble.

¹²Attorney General v Cowley and Kinrade (1858) 12 Moo.P.C. 27..

¹³Commissioners Report. (1792) 47-8 does refer briefly to an "audit court".

had merged with the Exchequer Court by the end of the eighteenth century or, more likely, by 1736 ¹. The Exchequer Court proper had jurisdiction over “misdemeanours and all species of wrongs which subjected the offender to the payment of a fine to the Lord” ², as well as civil and criminal matters related to courts revenue, royal rights and prerogatives . Additionally, it could take cognisance of “whatsoever business could not be well determined at term-times” ³. This could result in an indicted felon, who escaped before trial at the Court of General Gaol Delivery, being tried before this Court ⁴. The Court consisted of the Governor, Deemsters and other Council members ⁵. Additionally, the Court could summon a jury to assist its deliberations and, after 1737, was bound to do so in any misdemeanour which had not already been considered by some form of jury ⁶.

Turning to the lesser courts, the Courts of the Deemster were many and varied, but the Deemster had two important functions in relation to criminal law. First, the Deemster had some jurisdiction over misdemeanours. The Commissioners found that his jurisdiction extended to any criminal case where a specific fine or penalty was directed by statute ⁷. The case law does not suggest such a wide jurisdiction and Deemster Moore, who would be expected to know, referred only to jurisdiction over assault and battery ⁸. Rather, the Deemster had jurisdiction over the following misdemeanours - provoking words and batteries ⁹; criminal damage of livestock ¹⁰; and petty larceny ¹¹. Secondly, the Deemster was responsible for overseeing the jury of indictment required by customary law in case of felony or treason ¹². The Courts held in each sheading twice a year were primarily devoted to civil disputes, but the Moar presented blood wipes to this court for fine ¹³. The Governor presided,

¹References to the Debet Court were still being made in 1726 - see Order of 1726.

²Commissioners Report (1792) 36.

³CHALONER J., op.cit. (1656) 42.

⁴Casement [1641] L.P..

⁵See Commissioners Report (1792) 35-36.

⁶Criminal Law Act 1737 s.1 [o].

⁷Commissioners Report (1792) 42-3.

⁸Deposition of Deemster Moore to the Commissioners (1792) 75-6.

⁹Turf and Ling Act 1661 s.4 [o]; Criminal Law Act 1737 s.(5) [o].

¹⁰Unwholesome Meats Act 1673 s.3 [o].

¹¹Petty Larceny and Trespass Act 1748 s.1 [o]; Petty Larceny and Trespass Act 1753 s.1 [o]; see also Larcenies and Petty Offences Act 1629 [o].

¹²Treasons and Felonies Act 1777 [o].

¹³PARR, 19.01.

assisted by the Deemsters and other Council members ¹, as well as a jury in cases of bloodwipe ².

After Revestment, the Criminal Courts underwent considerable change. In this section we will consider the Court of General Gaol Delivery, the lesser criminal courts of first instance, and the development of the appellate court.

The second Code extended the jurisdiction of the Court of General Gaol Delivery to include misdemeanour ³. The composition of the Court also changed, with modifications to the number of jurors ⁴, and the identity of the presiding judge ⁵. The most significant change, however, was the exclusion of the Keys and Council from the Court in the early nineteenth century ⁶.

In 1823 the Governor complained of the conduct of the Keys, and was advised by the English Law Officers that the Council and Keys could be legally excluded from the Court ⁷. At the next Court, counsel argued that, due to the exclusion of the Keys, the Court was not validly constituted. The Court continued with business, but the opinions of the two Deemsters and the Lieutenant-Governor merit discussion.

Deemster Heywood stated that the Keys were an integral part of the Court, basing his view on the ancient and modern practice of the Court, punishment of delinquent Keys, and the views of Deemster Parr. Deemster Christian preferred the view, partly based on the law of contempt, that the Keys served the Court, rather than forming an integral part of it, and so could be excluded. The expert advice of these two assessors of Manx law conflicted. The Clerk of the Rolls was not present to resolve the point.

¹A.W. MOORE, 750.

²PARR, 19.01.

³Treasons and Felonies Act 1777 [o]; Code 1872 s.365 [o]; Criminal Code Amendment Act 1921 s.4 [o]. See Anonomous Note to Attorney General Clarke, 2 May 1826 [M.M.A. - G.O. 4/15].Code 1872 s.359 [o].

⁴Administration of Justice Act 1949 s.8 amending Criminal Code Amendment Act 1921 s.8; Jury Act 1960 s.27; Jury Act 1980 s.24. In case of treason, murder, or where the court found the case to be of sufficient gravity, a jury of twelve was used.

⁵Criminal Code Amendment Act 1921 s.3 [o]; Criminal Code Amendment Act 1921 s.5 [o]; Administration of Justice Act 1951 s.11 [o]; Criminal Jurisdiction Act 1993 s.1.

⁶See on their role, just before elimination, Johnston [1818] Weekly Gazette 10 September.

⁷See Peel to Lieutenant-Governor Smelt, 30 January 1824 [Letterbooks 3,230]; [1824] Rising Sun 10 February.

Lieutenant-Governor Smelt made no attempt to discern the better view. Instead, he referred to an order from Her Majesty's Government, issued after consultation with the English Law Officers, that he was to hold the Court without the Keys:

"I therefore feel bound to act agreeably to such intimation, as in my official situation I cannot do otherwise" ¹.

In due course the proceedings were contested before the Privy Council on the basis that the Court was not legally constituted ². The Privy Council found:

"that by the law of the Isle of Man the Keys do not form an integral and constituent part of the said Court of General Gaol Delivery, and that their not having been summoned to, or present at, the said Courts, does not affect the validity of the judgment promised against the petitioner" ³.

After that time, neither the Council nor the Keys attended the Court. From the same date the function of the Keys in reviewing erroneous verdicts of the jury of life and death ceased. This was curious since, not only was this function well supported by precedent ⁴ and statute ⁵, but it could be performed when the Keys were excluded from the Court. In *Carran* ⁶ the defendant was acquitted of felony in the Baronial Court. The Court decided that the jury had given a partial verdict, contrary to the evidence, and so ordered the jury and witnesses to appear before the Keys at a later date for review and, as it turned out, punishment. The same procedure could have extended to the Court of General Gaol Delivery ⁷. Clearly, the customary function of the Keys in advising the Deemsters of the law could not be discharged if they were excluded from the court. Accordingly, the decision of 1823 radically changed three distinctive Manx institutions - participation of the Insular legislature in the Court of General Gaol Delivery; the review of juries in case of felony; and the status of the Keys as an authority on Manx customary law in criminal cases ⁸. The actual scope of the Privy Council

¹Kelly [1824] Rising Sun 25 May; [1824] Rising Sun 1 June.

²This account most easily found in A.W. MOORE, 826-7. Original sources in H.O. 99/17.

³Kelly [1824] L.P..

⁴Kneen [1687] L.P.; Quin [1705] L.P.; M'Namees [1709] L.P.; Waterson [1753] L.P.; Wilkes [1723] L.P.; for the Keys to put themselves forward to perform the task was, however, manifestly incorrect - see Grand Jury Case [1601] L.P.; see Caine's Case [1645] L.P. for an example of this task having harmful repercussions upon Council members.

⁵Criminal Law Act 1736 s.(3) [o].

⁶Carran [1664] L.P.B..

⁷While it may be argued that the Code of 1817 caused the demise of this role - see Kelly [1824] Rising Sun 1 June *per* Deemster Christian - it would have revived in 1872.

⁸The decision was probably correct. See Customary Laws 1422 s.33; Craine [1517] Q.P.; Huddleston [1668] L.S..

decision was narrow. It did not expressly exclude the Keys from the Court in doubtful cases, or prohibit the review of the jury of life and death. Both these functions, however, ceased as a direct result of the decision. In both cases the consent of the Court was required to activate either function. A Governor who objected to the judicial role of the Keys was unlikely to have recourse to them for either purpose. His successors were equally unlikely to revive rather quaint practices which had ceased following a decision of the Privy Council ¹.

Turning to the less important Manx courts, this period saw the expansion of the courts of summary jurisdiction, which were staffed by professional judicial officers such as the High Baliff, or by justices ², sitting without a jury. After 1864 the jurisdiction expanded greatly, along the English model, to include some felonies. The Exchequer Court's jurisdiction in misdemeanour survived until 1817, when the creation of the Deemsters general jurisdiction in cases of misdemeanour superceded it ³. By that time, however, the sentencing role of the Debet Court had passed to this body ⁴, a jurisdiction which survived until 1872 ⁵. Between 1817 and 1921 the Deemster had an extensive jurisdiction over misdemeanours and, until 1918, over inquiries into felony ⁶.

Turning to the appellate courts, the Staff of Government had a jurisdiction to review the lesser courts. Before 1918 the Court was staffed by the Governor, and at least two from the First and Second Deemsters and Clerk of the Rolls ⁷. In 1918 the posts of Clerk of the Rolls and First Deemster were merged, the gap in the judicial roster being filled with the Judge of Appeal ⁸. After 1921 the Lieutenant-Governor was excluded from the two-member court, which thereafter was presided over by a Deemster aided by a Judge of Appeal ⁹. In the same year a Court of Criminal Appeal, based on the English court of the same name, was formed, and

¹See "Manx Political Literature (no.1)"[1825] Manx Rising Sun 29 February.

²Summary Jurisdiction Act 1864 s.2 [o]; Petty Sessions and Summary Jurisdiction Act 1927 s.3 [o]; Summary Jurisdiction (High Baliff) Act 1915 s.2 [o]; High Baliffs Act 1953 s.2 [o]; Petty Sessions and Summary Jurisdiction Act 1927 s.2,3,52,82 [o;o;1848/43/4;o]; High Baliff Act 1955 s.6 [o]; Petty Sessions Act 1864 s.22 [o]; Petty Sessions and Summary Jurisdiction Act 1927 s.82 [o]; Summary Jurisdiction Act 1988 s.2 [o].

³Code 1817 s.50 [o].

⁴Confirmed by Code 1817 s.51 [o].

⁵Code 1872 s.367,373 [o].

⁶Code 1817 s.50 [o]; Code 1872 s.370-373 [o]; Criminal Code Amendment Act 1921 s.6 [o]; Isle of Man Judicature Act 1883 s.20; Isle of Man Judicature Act 1883 s.20; Criminal Code Amendment Act 1918 s.3 [o].

⁷Isle of Man Judicature Act 1883 s.5,32 [o].

⁸Judicature Amendment Act 1918 s.2-6,9; High Court Act 1991 s.2,3 [o].

⁹Judicature Amendmen Act 1921 s.2,3,5,7 [o]; High Court Act 1991 s.3,23 [o].

exercised a separate jurisdiction until 1969 when it was merged with the Staff of Government¹.

Manx Criminal Courts other than the Royal Courts.

Members of the clergy who committed criminal offences were liable to trial and punishment, in the temporal courts, in the same way as the laity². By contrast, in English law the clergy were in many cases spared execution because of their status. The jurisdiction of the Manx Spiritual courts was limited to enforcement of spiritual regulations. In 1667, for example, these regulations prohibited rape, prostitution, suicide, fornication, adultery, incest, bigamy and perjury, as well as witchcraft and sorcery³, and offences peculiar to the clergy⁴. In some cases the offender was later turned over to the temporal court for punishment⁵. It should be also be noted that the spiritual punishments were more severe in the Isle of Man⁶.

After Revestment, many offences within the spiritual jurisdiction were transferred to the temporal court, and the number of punishments inflicted by the Court declined until the elimination of the general spiritual jurisdiction in 1884⁷. The general pattern of decline in this jurisdiction can also be found in English law⁸, although "the maintenance of ecclesiastical

¹Criminal Code Amendment Act 1921 s.11 [1907/23/3]; Criminal Code (Amendment) Act 1921 s.10(2),(3) [1907/23/1(2);o]; Judicature Amendment Act 1921 s.2 [o]; Criminal Code (Amendment) Act 1921 s.10(1) [1907/23/1(1)]; Judicature Amendment Act 1889 s.9; High Court Act 1991; Deputy Deemster [1661] L.S.; Criminal Appeal Act 1969 s.1 [1966/31/1(1)]; Criminal Jurisdiction Act 1993 s.59; Attorney General Gell to Lieutenant-Governor Walpole, 25 November 1882 [Letterbooks 38,601]; Criminal Appeal Act 1969 s.1(2),(3)(b),(5) [1966/31/1]; High Court Act 1991 s.2(1),18(3) [o;1981/54/53]; Criminal Appeal Act 1969 s.1(3)(a) [1966/31/1]; Criminal Appeal Act 1969 s.(2) [1966/31/1(2)].

²See Bishop's Case [1420] Q.P.; see also Cashen [1517] Q.P. where a minister was sentenced to death for felony.

³STENNING E.H., "Manx Spiritual Laws", (1952) I.O.M.N.H.A.S. (P.) 5,287.

⁴MATHIESON N., "Ecclesiastical Courts in the Isle of Man", (1952) I.O.M.N.H.A.S. (P.) 5,261.

⁵For instance, rape and witchcraft.

⁶cp. A.W. MOORE, 355-7,472-4; STEPHEN J.F., History of the Criminal Law of England, [London] (1883) ii.494.

⁷*Per* MATHIESON N., "Ecclesiastical Courts of the Isle of Man", (1950-2) I.O.M.N.H.A.S. (P.) 5,261 citing the Ecclesiastical Civil Judicature Transfer Act 1884. This Act itself does not seem to deal with the disciplinary jurisdiction, but it may be a final indication of that jurisdiction's demise.

⁸See STEPHEN J.F., op.cit., (1883) ii. 396-497.

discipline in the Manx Church [continued] at a period when that of the Church of England had practically ceased to be administered”¹.

The Baronial Courts also possessed a wide criminal jurisdiction². The Barons were allowed to hold their own courts in all matters, including misdemeanours dealt with by the Sheading courts, and felony. These courts had jurisdiction over barony tenants who were not born on the Lord's land, and who owed the Lord no other obligation³. The structure of these courts mirrored that of the Lord's Sheading courts⁴, and Court of General Gaol Delivery⁵, but usually lacked the Governor and his Council. It was the practice, however, for the Deemsters and the Attorney General to attend these courts, the latter to take note of the Lord's interests⁶. As well as advising on Manx law, the Deemsters were responsible for passing sentence of

¹A.W. MOORE, 488-92,503,505-6,657-9.

²The Baronies of the Isle of Man were by the start of this period exclusively held by ecclesiastical lords, but it is important to distinguish between the courts of these spiritual Barons, and the spiritual courts proper, as the jurisdiction and jurisprudential basis were quite different. See ASHLEY A., "Historic Relations of Church and State", (1954) I.O.M.N.H.A.S. (P.) 5, 513.

³See Barony Case [1569] Q.P.; Barony Case [1584] Q.P.; PARR 1.03-.05.

⁴PARR, 1.03.

⁵PARR. 1.06.

⁶PARR, 1.03.

death ¹. The Baronial jurisdiction was analogous to that of the English Counties Palatine before 1535 ². In 1535 it was provided by Act of Parliament that only the King of England should have the power to make any justice of assize, peace, or of general gaol delivery ³. The statute did not run to the Isle of Man, and the Baronial jurisdiction in felony continued until 1777, when the Treason and Felony Act 1777 appears to have limited jurisdiction in case of felony to the Royal Courts ⁴.

¹See Caine [1615] L.P.M.R.; Felon's Case [1637] L.P.D.E.; Quilliam [1600] L.P.D.E..

²See COKE IV, (1644) 204.

³27 Hen.8 c.24.

⁴See GELL J., The Ecclesiastical Courts of the Isle of Man, [M.M.A.] (1859); A.W. MOORE, 775; OSWALD H.R., Vestigia Insular Manniae Antiquaria, (1840) Manx Soc. 5,1.

Chapter Twelve: Offences Against the Person.

This chapter discusses those offences generally considered to be offences against the person in ascending order of severity, commencing with threats, and concluding with homicide. In the interests of brevity, sexual offences in general are also discussed in this chapter, even though many are not non-consensual offences. This chapter concludes with more speculative discussion of two areas of Manx law - recent reforms to the law concerning abortion, and attempted manslaughter.

Threats.

By customary law, threats were not the basis for a criminal offence unless a juror was threatened in court ¹, or an attempt was made to coerce the Governor ². Threats failing to constitute an assault ³ could, however, be restrained. For instance, in *Gell* ⁴ a defendant who threatened to burn down another's mill was committed to gaol until he found surety ⁵. After 1797 a number of statutory felonies and misdemeanours, based on English statutory models, prohibited threats ⁶. The misdemeanour of challenging another to a duel was novelly formulated in 1817 ⁷, but followed the English model after 1872 ⁸. In line with the English developments, the range of offences in this area was condensed in 1946 ⁹, and unified into the misdemeanour of blackmail in 1981 ¹⁰.

Abduction.

¹Juror's Case [1602] L.P.; PARR, 55.07.

²See p.227.

³eg. Carrett [1584] L.C..

⁴Gell [1665] L.S..

⁵See also Crellin [1806] L.S.; Fitzsimons v Ford [1807] L.S..

⁶Forgery, Perjury and Cheating Act 1799 s.3 [1757/24/1]; Code 1817 s.29 [1757/24/1]; Libel and Slander Act 1846 s.3 [1843/96/3]; Code 1872 s.31,133,169,170-173,176,190 [1861/100/16; 1861/97/50; 1861/96/44-48; 1843/96/3; 1861/96/61].

⁷Code 1817 s.42 [o].

⁸Code 1872 s.176 [1843/96/3]. There is weak authority for the proposition that, in regard to the Chief Officers at least, it was an offence under customary law to challenge another to a duel - see Ashton [1649] L.S..

⁹Larceny Act 1946 s.29,30,31 [1916/50/29-31].

¹⁰Theft Act 1981 s.23 [1968/60/21].

There was no general criminal offence of abduction ¹ or false imprisonment ² under customary law. This contrasts with the English law of the period, which punished some abductions as criminal offences ³. After 1872 there existed a number of statutory offences of abduction, based closely on English statute law ⁴.

Assaults.

By customary law, minor violence was a matter for the ecclesiastical ⁵, rather than the Royal, courts ⁶. It was not until 1661 that statute provided for the punishment, by a set fine, of "violent stroakes, batteries, unhumane and evil useage" ⁷. The punishment of the offence by a set fine may be derived from the more ancient offence of bloodwite ⁸. It appears, from later statutory developments ⁹, that this statute did not cover mere assault, as opposed to battery. English law was more advanced, providing from a much earlier date for a variable fine "if any ... committed unlawful assault, beating, wounding or such like trespasses against the body of a man" ¹⁰.

Additionally, Manx customary law recognised special circumstances where assault was a criminal offence ¹¹. It was a misdemeanour to assault a court officer ¹², or any other individual in court ¹³, an offence similar to the more varied and harsh treatment meted out by English

¹cf. Warrant for the arrest of men who had committed abduction in Ireland, issued by the Duke of Atholl, [1750] L.S..

²Consider Cole [1426] Q.P.; Shimmin [1660] L.P.; Christian [1721] L.S.; Cubbin [1807] L.S.; Gawn v Gallagher [1815] L.S..

³See COKE, III, (1644), Chapter 12.

⁴Code 1872 s.66-69 [1861/100/53-6]; Criminal Code Amendment Act 1886 s.9-10 [1885/69/7-8]; Sexual Offences Act 1967 s.16-20,23 [1956/69/17-21,4]; Sexual Offences Act 1992 s.15-16 [1956/69/17,21]; Code 1872 s.60A-60E as amended by the Criminal Justice Act 1991 sch.4. See 1982 c.28; 1984 c.37.; Maritime Security Act 1995 s.1-2.

⁵See p.194.

⁶Turf and Ling Act 1661 s.4 [o].

⁷Turf and Ling Act 1661 s.4 [o]. See Parsons [1692] L.S.; Bridson [1727] L.S.; Bridson [1811] L.S..

⁸See p.199.

⁹Code 1817 s.43 [o].

¹⁰LAMBARD W., *Archaionomia sive de priscis Anglorum Legibus Libri*, [Cambridge] (1644) 429.

¹¹Sexual assaults were not so regarded - compare Bridson & Sayle [1879] Manx Sun 22 March; Quayle [1754] L.P..

¹²See Carrett [1584] Q.P.; Coroners Case [1607] L.C.; M'Kerron [1497] Q.P.; Great Enquest Case [1596] L.P..

¹³See Vinch [1633] L.P.. If blood was drawn the offence was treason - see Taylor [1588] L.P..

law ¹. It was felony, peculiar to Manx law, to beat any individual upon the Kings Highway ². Finally, analogous to the English law protecting the sovereign ³, it was treason to assault the Governor, his Deputy, or anyone in his presence ⁴.

One further early case merits discussion. In *Stanley* ⁵, decided in 1650, a soldier assaulted a comrade in the Gate-house of the Castle ⁶. The Court decided that the proper punishment for the assault was forfeiture of a hand but that, since the defendant had no idea that such a punishment could follow the offence, it would be remitted. This case appears to be a judicial adoption of the English statutory offence punishing battery in Westminster Hall ⁷.

In 1817 the battery statute was extended to common assault ⁸. After 1836, this area was based upon English statutory models ⁹. From 1817 ¹⁰ a number of statutes, mostly based on English models provided for special punishment of some assaults ¹¹. Today, therefore, the law in this area is based on English models.

Wounding.

The most distinctive customary law offence in this area was bloodwite ¹², so called as a prosecution could succeed only if it were shown that blood had been drawn from the victim ¹.

¹See HOLDSWORTH W.S., *A History of English Law*, [London] (1923-66) iii 392-3.

²Customary Laws 1422 s.7; Highwaymans Case [1577] Q.P..

³See p.227.

⁴PARR 12.03, 12.07; Ordinances of 1430 s.3; Customary Laws 1422 s.14,15; M'Cawley [1430] Q.P.; Whetstones [1598] L.S..

⁵Stanley [1650] L.S..

⁶Castle Rushen, was at this time military stronghold, prison, court complex, and centre of government. Even at the time of writing, it serves practical legal functions, as a court and registry, as well as remaining a popular tourist attraction. The conflict between mediaeval design, for instance extremely thick stone walls, and modern technology, for instance cell-net portable telephones, can cause practical difficulties.

⁷33 Hen.8 c.12.

⁸Code 1817 s.43 [o].

⁹Justices Act 1836 s.8,9 [1828/31/27-9]; Summary Jurisdiction Act 1864 s.2 [1861/100/43-6]; Petty Sessions and Summary Jurisdiction Act 1927 s.56 [1861/100/43-6]. See Langton [1986] Law Society Library; Scatchard [1989] Law Society Library. See also Code 1872 s.41,59,60 [1861/100/26;o; 1861/100/47].

¹⁰See also the early specialist offences in Herring Fishery Act 1610 s.9,10 [o].

¹¹Summary Jurisdiction Act 1864 s.9(4) [1851/92/9(7)]; Petty Sessions and Summary Jurisdiction Act 1927 s.62(4) [1851/92/9(7)]; Code 1872 s.49,50,52,54 [1861/100/36,37;o;1861/199/40]. See also 1988 c.134; S.I. 1989/983 for the specialised offence of torture.

¹²More properly, blood-wite.

This doctrine was similar to the early English procedure in case of wounding ². Bloodwipe was punished with a set fine ³. In a number of cases, best viewed as examples of the general part, punishment would not be inflicted ⁴. From the start of the seventeenth century this pecuniary offence was supplemented with a more conventional misdemeanour, best defined as maim but encompassing disfigurement ⁵, and occasionally referred to as enormous assault ⁶. Additionally, it was a further misdemeanour to draw blood upon the Moar ⁷, and treason to draw blood within the jurisdiction of the court ⁸.

The earliest statutory offence of wounding was the felony of mayhem, defined by the Code of 1817 as "the felonious, violent and malicious wounding, disabling, mutilating and disfiguring of another" ⁹. Later statutory offences in this area followed the English model ¹⁰. The Code of 1817 also created the felony of wilfully and maliciously shooting at another, with intent to slay or wound, even when death did not result ¹¹. Later offences in this area followed the English model ¹².

Sexual Offences.

As in England, Manx customary law defined rape as the ravishment of a female against her will ¹³. Rape was felony, but the punishment of the offence was exceptional. Where the felon

¹See Bullock v M'Cray [1417] Q.P.; M'Cray v Bullock [1417] Q.P.; Master's Case [1581] L.P..

²See BRACON H. de, op.cit., 345-6.

³See PARR, 19.01-.06.

⁴See Christian [1632] L.P.; Duellists Case [1603] L.P.; Soldiers Case [1581] L.P.; Robinsons [1632] L.P.; Moor [1669] L.S.; Bystanders Case [1581] L.P. - the last is especially interesting as it indicates that bloodwipe was excused if the victim had used witchcraft against the defendant, and had spilt their blood in order to cancel the enchantment. This case has been misused to explain the origin of the term bloodwipe see AIRNE C.W., Date Reference Book of Manx History, [M.M.A.] (1967).

⁵Maim Case [1606] L.S.; cp. LAMBARD, op.cit., 429; BRACON H. de, op.cit., 408.

⁶See Lieutenant-Governor Smelt to Lord Sidmouth, 24 April 1817 [Letterbooks 2,204; also at H.O. 98/68].

⁷Christian [1617] L.P..

⁸Taylor [1586] L.P.. This was similar to the English law - see COKE III, (1644) Ch.73,83.

⁹Code 1817 s.22 [o]; See Crow [1829] L.P..

¹⁰Code 1872 s.35 [1861/100/20]; Creer [1878] Law Society Library; Clarke [1881] Law Society Library; Killip [1961-71] Manx L.R. 349.

¹¹Code 1817 s.21 [o].

¹²Code 1872 s.23,33,36 [1861/100/11,18,21]; Jewell [1983] Law Society Library; Caley [1881] Law Society Library.

¹³Whaltrough [1552] Q.P..

and the victim were both unmarried ¹, the victim was given a sword, a rope, and a ring by the Deemster, who was normally responsible for passing sentence on convicted felons ². She was then to choose whether to hang him with the rope, cut off his head with the sword, or marry him with the ring ³. Effectively, the Deemster passed the power of sentencing to the woman as he passed the physical items. The details of this process are uniquely Manx, but the concept can be found in the practice of early English and European courts ⁴, as well as a ninth century Scottish statute ⁵. This customary procedure for rape survived until 1817, when it was replaced with punishment in line with English law, though it was not until 1967 that an English statutory model was adopted ⁶. The substantive law in this area is now identical with English law.

The first Code also adopted long-standing English law ⁷ and provided that consensual sexual intercourse with a girl under ten years of age was felony ⁸. Later statutes extended vitiation of consent, based largely upon English statutory models ⁹.

The final area to consider is sodomy between human beings. A statute of 1665 stated that buggery was not a customary offence, and then prohibited bestiality alone ¹⁰. It may be argued, therefore, that Manx law did not prohibit sodomy until some time after Revestment ¹¹, while English law punished the offence as felony by 1533 ¹². This interpretation is supported by a letter from Lieutenant-Governor Smelt to the Home Office in 1817, where he complained that the Act of 1665 did not prohibit sodomy, that there was no instance of such a prosecution

¹Also, presumably, beyond the bounds of consanguinity.

²Declaration of 1603, L.P..

³Customary Laws (no.2) 1577 s.15; see FELTHAM J., A Tour Through the Isle of Man, [Bath] (1798)..

⁴BRACTON H de., op.cit., 414-9.

⁵Statute of Kenneth, 834.

⁶Code 1817 s.8 [o]; Templeton [1820] L.P.; Kerruish [1829] L.P.; Code 1872 s.61 [o]; Sexual Offences Act 1967 s.1 [1965/69/1]; Sexual Offences (Modification) Act 1979 s.1 [1976/82/1]; Gallagher [1983] Law Society Library.

⁷See COKE III, (1644) Ch.11.

⁸Code 1817 s.10 [o]; Duncan [1836] Manx Sun 27 May.; Jones [1841] L.P..

⁹Code 1872 s.62-4 [1861/100/49-51]; Criminal Code Amendment Act 1886 s.5,6,7,12 [1885/69/3,4,5,4]; Children Act 1910 s.20 [1908/67/17]; Criminal Code Amendment Act 1914 s.5 [1880/45/2]; Mental Diseases Act 1924 s.73 [1913/28/56]; Children and Young Persons Act 1966 s.2-3 [1933/12/2-3]; Sexual Offences Act 1967 s.1-4,7,13,14 [1955/69/1-4,7,14,15]; Criminal Law Act 1981 s.1(1) [1960/33/1].

¹⁰Statute Law Act 1665 s.11 [o].

¹¹See p.201.

¹²25 Hen.8 c.6; FLETA, Ioannis Seldeni et Fletam Dissertatio, [Cambridge] (1697) Ch.35.

in the Manx records, and that this lacunae required statutory amendment ¹. After 1817 buggery was punished as a statutory offence based, after 1967, on English statute ². In contrast to English law, which provided a limited defence to this charge after 1967, it was not until 1992 that consent to homosexual activity was a defence. In that year the law relating to sexual offences was restated with a number of important changes. The Manx legislature had, under pressure from the British government, accepted the need to change the law relating to sodomy, and the 1992 Act broadly adopted the English law in this area ³.

The 1992 Act, which renovated the entire area of sexual offences rather than simply dealt with one contentious issue, also updated much of the language used in older statutes, and codified a number of changes made to earlier Acts in the Manx and English jurisdictions. A number of important specific changes were also made: firstly, many offences can now be committed by both sexes, although the liability of women for raping men remains unclear ⁴; secondly, the so-called “young man’s defence” to unlawful sexual intercourse with persons under 16 years extends in a simplified form, with no age limit, to both sexual intercourse and indecent assault.

Homicide.

Turning to homicide, in 1526 it was stated that a man who drowned himself forfeited his goods ⁵. English common law imposed similar forfeiture for a suicide ⁶. The forfeiture has been classified as deodand, which may be incorrect, since at customary law a deodand was a beast responsible for a human death, and thus forfeit to the Lord ⁷; while the distinguishing feature of suicide was that the cause of death sprang from the intent of the accused ⁸. Accordingly, it seems that at customary law suicide was a form of felony, albeit one with limited forfeiture ⁹. At one time English common law drew a distinction between those who committed suicide in order to avoid conviction for a crime, and other suicides ¹⁰, but this

¹Lieutenant-Governor Smelt to Lord Sidmouth, 24 April 1817 [Letterbooks 2,204; also at H.O. 98/68].

²See Code 1817 s.11 [o]; Code 1872 s.74 [o]; Sexual Offences Act 1967 s.11(1) [1956/89/12(1)]; See Caine [1988] Law Society Library. On gross indecency between men see Criminal Code Amendment Act 1886 s.15 [1885/69/1]; Sexual Offences Act 1967 s.12 [1885/69/4].

³Sexual Offences Act 1992 s.9 [1967/54/1].

⁴ Contrast Sexual Offences Act 1992 s.1,3,4,40(2).

⁵Suicides Case (1526) Q.P..

⁶See BRACTON H. de, *op.cit.*, ii 506.

⁷PARR, 43.01-.04.

⁸Huddleston [1689] L.S..

⁹See Customary Laws 1419 s.1-2.

¹⁰See BRACTON H. de, *op.cit.*, ii 506; STAUNDERFORD W., *Les Plees del Coron*, [London] (1574) 19 D..

distinction does not appear in Manx law ¹. Suicide was declared felony by the Code of 1872 ². In 1981 Manx law was brought into line with English with the replacement of this felony ³, with the misdemeanour of aiding, abetting, counselling or procuring of the suicide of another ⁴.

Where the killer was not also the victim ⁵, early Manx customary law drew no distinction between murder and manslaughter ⁶. Accordingly, we will consider the offence of "absolute homicide" ⁷ in full, before turning to consider the aggravated offence of murder. Customary law punished as felony the unjustified, and unexculpated, killing of another human being ⁸ by action or culpable omission. Obviously, the public hangman was justified in performing his lawful duty, and the soldier or officer was entitled to use lethal force if necessary for his duties. The position of the private individual is more difficult to state, but it appears that homicide in self-defence was liable to punishment as felony ⁹, as was homicide in chance-medley ¹⁰. Mere *sine qua non* causation did not establish liability, although it was clearly necessary to establish that death had been hastened by the defendant ¹¹. Some additional element of culpability had to lie with the act of the defendant. No general principle can be drawn from the cases, but *Blackmoor* ¹² is a good example. In that case the deceased attempted to start a fight with the defendant, who pushed him backwards. The deceased slipped, fell and died. The jury found that the death had been caused, not by the defendant, but through an excess of drink so that the deceased "was not able to rule his feet". The need for

¹The rule allowing forfeiture of a felon who died, for any reason, before trial seems to have fulfilled a similar function. See *Dead Felon's Case* [1519] Q.P..

²Code 1872 s.29 [o].

³Criminal Law Act 1981 s.2(2).

⁴Criminal Law Act 1981 s.2(1) [1961/60/2(1)].

⁵See COLUMNIST, "Peeps into the Past", [1958] Ramsey Courier, 4 July; [1958] Ramsey Courier, 27 June; [1968] Ramsey Courier, 8 November; COLUMNIST, "Murder Most Foul", [1973] Isle of Man Courier, 12 January; COLUMNIST, "The Island Murder Story" [1968] Manx Examiner, 25 January.

⁶Unlucky Blow [1554] Q.P.; Lantree [1559] Q.P.; Wife's Case [1520] Q.P..

⁷PARR 19.02.

⁸Even an alien - see Dickinson [1645] L.P..

⁹Brew [1586] Q.P..

¹⁰CHALONER J., *op.cit.*, (1656) 37.

¹¹See the later case of Gray [1868] Mona's Herald 2 November. Brew [1831] Manx Sun, 15 November may also be explicable on the basis of medical evidence submitted to causation.

¹²*Blackmoor* [1559] Q.P.; see also *Fowlers Case* [1624] L.S. where an accidental shooting was declared to be "mere chance".

blameworthiness in English law was less clear ¹. Third, there is some evidence that omissions could ground a charge of homicide ². Murder as a distinct offence, separated from manslaughter by malice aforethought ³, dates from a case of 1649 ⁴. During this period the distinction was relatively unimportant ⁵, since both felonies were punished by death.

The Code of 1817 reduced manslaughter to misdemeanour, and defined it as the unlawful killing of another ⁶ without malice, either express or implied ⁷. Although of lesser degree than in English law, this offence was otherwise identical to the extant English law. The offence was increased to felony in 1832, and the definition slightly simplified ⁸. The first Code also defined murder as felony ⁹. The basic structure of the felony followed that of English law, but statutory amendments to the content of malice aforethought lagged behind English innovations ¹⁰. Additionally, case law and statutes introduced a number of doctrines, based upon English models, which blurred the distinction between murder and manslaughter ¹¹.

Recent Reforms of the Law related to Abortion.

Review of this area of law began in 1983, with a Private Member's Bill intended to address the concerns of the Isle of Man Medical Society that their counselling of pregnant women might be unlawful. Although this Bill was discontinued, the worries remained, and were added to by a report in May 1991 by the Liverpool University Health Planning Consortium,

¹It should be noted under this head that the year and a day rule, found in English law, can be found in the cases, although not as *ratio decidendi* - Duchan [1580] L.S.; Clarke [1642] L.S..

²Cowle and Kellage [1628] L.P.. See the later case of Kelly [1870] Mona's Herald 25 May.

³See Cowne [1649] L.P.; Clucas [1713] L.P.; Curlett [1794] L.P.; Lantree [1559] Q.P..

⁴See Stanley [1649] L.P.; Garland [1650] L.P.; see also Clarke [1560] Q.P.; Dickinson [1645] L.S..

⁵Except perhaps in guiding exercise of clemency - see the later case of Morrison [1827] Manx Sun 29 August.

⁶An excusable homicide was not unlawful. This was the finding of the jury in Woods [1836] Manx Sun 16 September, where the defendant was charged with manslaughter by running the victim down with a vehicle.

⁷Code 1817 s.29 [o]; Howland [1819] L.P..

⁸Criminal Law Amendment Act 1832 s.9 [o]; Code 1872 s.20 [o]; Don [1934] Law Society Library; Kneen [1973] Law Society Library; Kermode [1888] Law Society Library.

⁹Code 1817 s.8; Kinread [1823] L.P.; Morrison [1827] Manx Sun 29 August; Brew [1831] L.P.; Simplified by Code 1872 s.18 [o]; Frankland [1980] Law Society Library; Frankland [1987] Law Society Library; Lunney [1973] Law Society Library; Moore [1983] Law Society Library; Pate [1981-3] Manx L.R. 243; Cowley [1844] A.N.; Cottier [1881] Law Society Library; Kelly [1889] Law Society Library.

¹⁰See Evidence Act 1983 s.6 [1967/80/8]; Criminal Law Amendment Act 1985 s.1(1).

¹¹Criminal Law Act 1981 s.1(1) [1960/33/1]; Infanticide and Infant Life Preservation Act 1938 s.2(1) [1922/18/1(1)]; Code 1872 s.22A (as amended by Criminal Justice Act 1991 Sch.4).

which, *inter alia*, recommended some extension of the scope of lawful termination. Following the report, the Council of Ministers asked the Social Issues Committee of the Council to consider reforms to the law.

Given the relatively restrictive law of the Island, which only allowed abortion on the grounds of necessity, a number of terminations were being carried out upon Island residents, lawfully, within England. The Manx authorities were resigned to this happening so long as Insular law was more restrictive than the law of England ¹, and the Committee viewed this situation in a wider context:

"Women from many countries have often had to travel to other countries to obtain terminations to circumvent restrictions their own society has placed on their personal choice as in the case of women from the Isle of Man who have travelled to England and who will no doubt continue to do so" ²

This aside, an obvious problem with the *status quo* was that, by "exporting a tragic social problem" ³, the Island forced "women in distress to leave the Island to obtain terminations elsewhere" ⁴. Thus, local women may not have had the opportunity for prior counselling ⁵, and, after the termination, would return to the Island without any long-term support structures. It might also be expected that the need to travel to another jurisdiction to gain an termination would lead to later terminations, with the consequent increased risks. The Manx statistics do not indicate that this was the case ⁶, but do suggest that very young women may have found it harder to obtain a speedy termination ⁷. Additionally, by requiring Island residents to travel to England the law "[was] likely ... to deter less well off women and thereby discriminate against them in their ability to control their fertility" ⁸.

As well as these features, the lawmakers were especially concerned with the impact of existing law on doctors in the Isle of Man. In particular, there was concern that doctors counselling pregnant woman could, if the normal options in England would include

¹See PHC(D), para. 38.

²See CM, para. 13.1

³PHC, para. 5

⁴PHC, para. 32.

⁵PHC, para. 36; CM, para 5.8(b)

⁶CM, Appendix 1A, para. 5.9.

⁷CM, Appendix 1A, para. 5.10.

⁸CM, Appendix 1A, para. 5.8. See *TRIBE L., Constitutional Choices*, [Cambridge, Mass.] (1988) 243.

termination, be committing an offence by aiding and abetting an unlawful termination. Additionally, with increasing availability of techniques for diagnosing foetal abnormalities, doctors were concerned they might be in a position where they could advise the woman of the abnormality of her foetus, but not offer termination if she desired it ¹.

Having decided to review the law, the Insular authorities then considered the approach taken in a number of jurisdictions. This shows a welcome independence from the, occasionally slavish, adoption of English models discussed elsewhere. The Committee considered the law in thirty European and non-European jurisdictions, albeit briefly, and extensively discussed the existing English law, before proposing reforms.

The Bill which was later to become the Termination of Pregnancy (Medical Defences) Act 1995 entered the House of Keys in 1994. At that time, it contained three statutory defences allowing lawful termination. The first, contained in section 1, was where the medical experts are "of the opinion, formed in good faith, that the termination of the pregnancy is necessary to preserve the life of the pregnant woman". The second, contained in section 4, allows termination at any time where there is a substantial risk that the child, if born, would suffer from such physical or mental abnormalities as to be unlikely to survive birth, or be incapable of maintaining vital functions after birth, or be seriously handicapped. The third, contained in the section 5, was where the pregnancy may have been the result of a sexual offence. Sections 1 and 5 merit fuller discussion.

Although s.1 appeared to be a restatement of the customary law, it is explained in a curious way later in the Act. Section 2 provides a number of "examples" of where a "termination shall, for the purposes of [section 1], be necessary to preserve the life of the pregnant woman". Effectively, the examples in s.2 are, by being treated constructively as threats to the life of the pregnant woman, in themselves grounds for a lawful termination. The examples are (a) where the continuance of the pregnancy would involve a substantial risk, other than the normal risks involved with pregnancy and child birth, to the life of the pregnant woman, greater than if the pregnancy is terminated; and (b) the termination is necessary to prevent grave permanent injury to the physical or mental health of the woman.

¹CM, 4.3, 4.5-4.9.

Section 5, concerning termination on the grounds of a sexual offence within twelve weeks, attempts to deal with some of the obvious problems with this head. Thus, the pregnant woman must produce an affidavit, or other evidence on oath, to the medical practitioners that the pregnancy may have been caused by rape, incest, or indecent assault. Additionally, she must have made a complaint to the police about the alleged offence as soon as was reasonable in the circumstances, and the medical practitioners must believe that there are no medical indications inconsistent with the allegation. This rather curious blend of medical and uncorroborated legal evidence is restricted in its use by the proviso that evidence in respect of the termination may not be admitted in criminal proceedings related to the alleged sexual offence without the leave of the court.

The House of Keys first debated the Bill on the 14th of February 1995. The Bill was put forward as a rationalisation of the *Bourne* defence, along with a compassionate recognition of the special needs of women pregnant with an abnormal foetus, or as a result of a sexual offence. It was not, in the words of Mr. May, MHK, intended to legalise "terminations for social purposes... Of the 250 women each year who leave the Island for the purpose of seeking an termination, only a very small number will have the comfort this Bill will actually bring" ¹. The clauses of the Bill were recognised as problematic, particularly section 5, which was defended by Mr. May on the basis that any false complainant could be punished by imprisonment ². A number of expansions and explanations were added to the Bill, including a clause making it clear that, during termination, the medical practitioner has a limited duty to preserve the life of the child if possible ³; an expanded definition of seriously handicapped as one "not capable of being cured or substantially relieved by treatment and the passage of time" ⁴; and provisions for disposal of the foetus ⁵. The most significant change was a limitation on termination on grounds of serious handicap (but not inability to maintain vital functions after birth) of twenty four weeks ⁶.

¹Report of Proceedings of House of Keys, 14/2/1995 at K429.

²ibid., K444.

³s.3.

⁴s.4(2).

⁵s.6(5).

⁶s.4(3).

The sexual offences head of the Manx Act seems very problematic to this writer ¹. The first problem with a head of this nature is that it is justified, at least in part, by an undercurrent that it is unjust for a woman to be forced into the risks and strains of pregnancy without consent to the sexual act which has resulted in the pregnancy; as well as the psychological damage caused by a pregnancy resulting from an assault upon the woman ². There is without doubt some distinction in the Bill between the "innocent" pregnant woman, who has not consented to sexual intercourse; and the "guilty" pregnant woman, who has consented to sexual intercourse, albeit without consenting to the resulting pregnancy. Indeed, without this distinction, this head would not necessarily require separate coverage, as the psychological injury involved could be incorporated into the grave mental injury head of termination ³. It must be queried whether this is a distinction modern legislation should be drawing. Leaving aside the issue of pressures on a woman to ensure that she is considered in the former and not the latter category, which can be overemphasised, the dichotomy appears to enshrine a prejudice against women who consent to sexual activity.

Secondly, the section extends beyond non-consensual sexual activity. Rather nebulously, the Committee recommended that termination be lawful up to twelve weeks where the pregnancy was the result of "rape or a sexual crime" ⁴. It seems clear that the Committee was thinking primarily of incest within this definition ⁵. Apart from the obvious point that incest can be committed consensually, the reference to "sexual assault" in the section opens the door to another field. Under Manx law, persons under sixteen years are, *de jure*, unable to consent to sexual activity. While this inability to consent does not render their partner guilty of rape, but of the offence of intercourse with a young person ⁶, it does render them guilty of sexual assault ⁷. Thus, this section actually provides an option for (i) victims of non-consensual sexual intercourse who may have conceived thereby; (ii) woman who may have conceived

¹The Manx legislature also found it so - the drafting of this clause was hotly debated.

²See Mr. May, Debates of Tynwald Court, 15/2/1994 at T309.

³There was some recognition during debate of the Bill that the sexual offences clause could be subsumed by the more general clause.

⁴CM, para. 14.3.

⁵CM, para. 6.1.

⁶Sexual Offences Act 1992 s.4.

⁷Sexual Offences Act 1992 s.13(2).

through consensual sexual intercourse with a prohibited relative; (iii) any woman under the age of consent when she conceived. If the section really was intended to allow women in these categories, but not other women, to exercise a free choice over termination, it might have been better to have made it clearer ¹.

Most crucially, the section suffers from an attempt to include doctrines from another area of law, criminal law, within the definition of lawful medical treatment. A number of problems flow from this attempt.

First, the section does not appear to recognise that, in Manx criminal law, a woman can be the victim of non-consensual sexual activity, while the man imposing such activity has not committed a criminal offence. In Manx, as in English, law the *actus reus* must be accompanied by the relevant *mens rea*, and the absence of a valid excuse. In fact, the structure of the section, by focusing on the experience of the victim, rather than the liability of the other party, avoids these problems.

Second, the section is faced with the difficulty, given a low time limit for termination, and the relatively slow criminal justice system, of relying upon something other than a conviction for a sexual offence to establish that such a sexual offence has in fact been committed ². The mechanisms by which the Act chooses to establish the existence of the offence are seriously flawed. While an affidavit by the woman that she has been the victim of a sexual offence would seem an obvious component of such proof, it must be queried whether reliance upon the threat of prosecution, and ultimately imprisonment, should the claim later be believed to be false, is a useful way forward. More problematic is the requirement that the alleged offence be reported to the police as soon as "was reasonable in all the circumstances". People react differently to violent assaults, and indeed may only decide to report an offence when

¹Point (iii) was raised during debate by Mr. May, Debates of Tynwald Court, 15/2/1994, T309, and it may have been thought the restriction of the section to rape, incest, and sexual assault, rather than the broader sexual offence, dealt with this problem. As I argue in the text, the section would appear to still cover sexual activity with persons below the age of consent. It is worth noting that there exists English authority, which is likely to be followed by the Manx courts, that evidence of sexual intercourse may be used to establish an indecent assault if for some reason a charge of rape could not be preferred - see Waite [1892] 2 QB 600; Williams [1893] 1 QB 320; Forde [1923] 2 KB 400; Keech (1929) 21 Cr.App.R. 125; Maughan (1934) 24 Cr.App.R. 130. The analogy seems obvious.

²A point raised, *inter alia*, by the Bishop of Sodor and Man, Debates of Tynwald Court, 15/2/1994, T311.

they realise it is the only way to gain a termination of the pregnancy imposed by the assault. It seems inappropriate, therefore, to impose a duty to report the offence upon the victim. It can be argued with some justification, however, that such problems could be ameliorated by a sensitive determination of "reasonable".

Unfortunately, the Act does not state who is to determine whether the report was made within a reasonable time. The only meaning I can extract from the section is that it is the duty of the medical practitioners carrying out the termination, if they wish to claim the statutory defence in the section, to ensure that this criteria is satisfied - the section does *not* simply allow the practitioners to claim the defence if they believe it has been satisfied, although such a result may follow from general application of criminal principles to any such offence ¹. In either case, the medical practitioner is placed in the curious position of being required to determine an issue more normally left to the judiciary - what is reasonable in all the circumstances. It must be queried whether this reversal of the normal situation, whereby lawyers dabble in medical matters, is any more desirable.

All of these features indicate that this section should be monitored closely. It may be that these difficulties will prove illusory, and that the Act extends a more compassionate understanding to the victims of serious crime. On the other hand, it may be that a better solution to this special trauma is to remove it from an express legal framework and include it under the general head of potential damage to the woman's mental health. It may even be that, given the flaws in the section, this will occur *de facto*, rather than *de jure*.

Attempted Manslaughter in Manx Law.

Deliberate killings in the Isle of Man are rare and it is easy to assume that the Manx law concerning homicides, and attempted homicides, is identical to the law of England. I would suggest, however, that despite the absence of an authority directly on point, the Manx law concerning attempted homicide is radically different from the modern English law, in that the existence of a partial defence of provocation is available to a charge of attempted murder. As this discussion is intricately tied to the specific offence of homicide, it seems sensible to

¹Section 5(1) states "a person shall not be guilty of an offence ... when a pregnancy is terminated by a hospital surgeon if - (a) the surgeon and an independent medical practitioner are of the opinion, formed in good faith, that the pregnancy has lasted for less than 12 weeks; and (b) the requirements of subsection (2) have been complied with". Subsection (2) deals with the three heads of evidence discussed in the text.

discuss it as a post-script to this chapter, rather than in the general discussion on attempts which can be found elsewhere.

The current definitions of murder and manslaughter are contained in the Criminal Code of 1872. The section of the Code dealing with homicide is worth reproducing at length:

18. Whosoever shall unlawfully and feloniously kill another, with malice aforethought, shall be guilty of murder ...

20. Whosoever shall unlawfully and feloniously kill another, without malice aforethought, shall be guilty of manslaughter ... and in any trial for murder, if the jury shall be of opinion that the party accused has been guilty of manslaughter only, and thereupon the Court may pass such sentence as if such person had been convicted upon an indictment for manslaughter.

22. No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony."

These sections of the Code have not been subject to very much in the way of construction. The favourite approach, adopted in cases such as *Lunney*¹, and by the Judicial Committee of the Privy Council in *Frankland and Moore*², has been to treat them as a statutory formula by which the English definition of murder and manslaughter is expressed in Manx law³. In *Frankland and Moore* Lord Ackner noted

"In the Isle of Man, murder is a statutory offence ... It is common ground that this definition has been given the same meaning in Manx law as the common law offence of murder in English law."

Case law has thus tended to follow a definition of the offences of murder and manslaughter taken from contemporary English cases⁴, rather than looking closely at the exact wording of the statute.

It is clear that, in current English law, provocation is not a defence to attempted murder¹. There are a number of grounds for suggesting the law in the Isle of Man is different.

¹Lunney [1971-3] Manx L.R..

²Frankland and Moore [1987] A.C. 576.

³This view is justifiable despite the status of the Code in Manx law. See *Bank of England v Vagliano* [1891] A.C. 107 (House of Lords); DWORKIN G., *Odger's Construction of Deeds and Statutes*, [London] (1967) 335.

⁴See Howland [1819] Liber Placitorum; Kinread [1823] Liber Placitorum; Morrison [1827] Manx Sun 29 August; Brew [1831] Liber Placitorum; Woods [1836] Manx Sun 16 September; Cowley (1844) Advocate's Notebook; Cottier (1881) Law Society Library; Kermode (1888) Law Society Library; Kelly (1889) Law Society Library; Don (1934) Law Society Library; Kneen (1973) Law Society Library; Frankland (1980) Law Society Library; Moore (1983) Law Society Library; Pate [1981-3] Manx L.R. 243.

Firstly, from the English authorities it seems clear that the older cases considered that, when an individual would have been able to claim provocation had their victim died, the offence committed when they attacked the victim was not attempted murder ². I have argued elsewhere that decisions on English statutes, if declared before an Act of Tynwald adopted the English statute, should be given especial force in Manx courts ³. Similar factors may indicate that decisions on the English common law, where the common law is later given statutory form, should be given especial force. This would have the result of causing Manx law to stultify at the moment when English common law crystallises into an Act of Tynwald. The whole tenor of the Judicial Committee decision in *Frankland and Moore* ⁴ is against such a view, although that case was concerned with a technical term, whereas in this case we are concerned with simple interpretation of the words of the statute.

It seems unlikely that the Manx courts would consider themselves bound by discredited authorities on the English common law when interpreting a Manx statute. Nonetheless, it is important that the statute was drafted at a time when a particular legal view predominated, as it is at least suggestive that the statute as drafted may have been intended to bear a meaning compatible with the view of doctrine then current.

Secondly, English law appears to be based on provocation as a genuine defence - that is an additional element which provides a defence to murder even in the presence of the *mens rea* for murder ⁵ - rather than as a feature which negates the *mens rea* for murder. The pre-1872 English case-law does not entirely support this view, and it appears that the Code of 1872

¹See Cunningham [1959] 1 Q.B. 288; Bruzas [1972] Crim L.R. 367 cf. commentary and CLRC/OAP/R para. 98; Campbell (1977) 38 CCC (2d) 6 (Can.); Jack (1970) 17 CRNS 38 (Br.Col.); [1980] Crim L.R. 538.

²See Thompson (1825) 1 Mood 80; 168 E.R. 1193; Bourne (1831) 5 C&P 120, 172 E.R. 903; Beeson (1835) 7 C&P 142, 173 E.R. 63; Thomas (1883) 7 C&P 817, 173 E.R. 356; Hagan (1837) 8 C&P 167, 173 E.R. 445. See [1973] Crim L.R. 727;.

³ See p.21.

⁴Frankland and Moore [1987] A.C. 576.

⁵See A-G of Ceylon v Perera [1953] A.C. 1369; Lee Chun Cheun v R [1963] A.C. 220; Parker v R [1964] A.C. 1369; Martindale [1966] 1 W.L.R. 1564.

was framed on the basis of provocation as a negator of the mental element in murder. This point needs expanding slightly.

Consider a typical instance under the Code, where a person kills under circumstances which would allow them to plead provocation. If provocation in Manx law is an additional defence, which operates even in the presence of the mental element in murder, then they kill with malice aforethought, but are entitled to an additional non-statutory defence of provocation to the charge of murder. Provocation normally functions as a partial defence, and a conviction for manslaughter would follow. But the Manx criminal code states:

"20. Whosoever shall unlawfully and feloniously kill another, without malice aforethought, shall be guilty of manslaughter ..."

In the example given, the defendant has killed *with* malice aforethought, and so does not fall within the definition of the offence. It could be argued that the section includes killings with malice aforethought but, if that was the case, why does the clause exist? That meaning could equally have been carried out, and indeed rather more clearly, with the phrasing "Whosoever shall unlawfully and feloniously kill another shall be guilty of manslaughter". There is no more need to allude to the absence of malice aforethought to preserve the status of murder than, for instance, to allude to the absence of force or threat of force in a definition of theft so as to preserve the status of robbery.

On this construction, the theoretical basis which accounts for provocation providing a partial defence to murder in Manx law, as it undoubtedly does, is that it is part of the definition of malice aforethought. In Manx law, malice aforethought is defined as the intention to kill or cause really serious harm in the absence of circumstances bringing into effect the doctrine of provocation. Given that attempt requires, *inter alia*, that the mental element for the completed offence be present, it would appear that an attempted murder in circumstances where the provocation defence would be available does not satisfy the requirement of malice aforethought.

Thirdly, the 1981 legislation on the law of attempt, would appear to have created an offence of attempted manslaughter. Given the definition of involuntary manslaughter which seems common to Manx and English law, it seems that this offence would not be possible to commit if some forms of voluntary manslaughter were not capable, at law, of being attempted.

It is submitted, therefore, that the Manx criminal law does not recognise an attempted killing under the influence of provocation as attempted murder, but rather as attempted manslaughter: an offence not clearly recognised in English law.

A number of practical issues need to be dealt with in order to implement the partial defence of provocation to attempt, and the offence of attempted manslaughter. When passing sentence on a person convicted of attempted manslaughter, the Court should recognise that the jury, or the prosecution, have recognised that this was not so serious an offence as attempted murder, and pass sentence accordingly. Murder, manslaughter, attempted murder, and attempted manslaughter, all carry the same maximum penalty - life imprisonment. It would generally be as inappropriate for the Court to pass the same sentence for attempted manslaughter as it would for attempted murder, as to pass a life sentence for manslaughter under provocation ¹.

¹See WILLIAMS G., Textbook on Criminal Law, [London] (1983) 524. But this is not to say that all courts would adhere to this principle - see Peck (1975) Times 5 December.

Chapter Thirteen: Offences against Property Rights.

Under this heading we will consider damage to property, offences of deception, theft and aggravated forms of theft, and finally unlawful dealing with goods obtained by one of the earlier offences.

Property Damage.

The principal customary offence relating to property damage was arson, although a number of related offences concerning the misuse of resources ¹ and the destruction of evidence relating to a felony ² or other legal dispute ³ also existed. The felony of arson, which was identical to the English common law ⁴, was committed where the defendant deliberately ⁵ set fire to a house ⁶, or haystack ⁷, belonging to another ⁸. Before Revestment a number of original statutes dealing with specific forms of criminal damage were enacted ⁹. Against the analysis in this paragraph must be placed the view of the House of Keys in 1813 that arson was not a capital offence ¹⁰. This analysis is well grounded in the cited authorities, and so should be preferred. It may be that the House of Keys were complaining about the definition of the offence, rather than the offence itself, but it is more likely that these two views are simply incompatible.

The Code of 1817 created three offences of property damage - two felonies of arson ¹¹, and a misdemeanour relating to other malicious damage ¹². After 1872 the statutory offences in this

¹See for instance Quayle [1645] L.P.; Kerruish [1659] L.P.; Gell [1660] L.P.; Pinfolders Case [1553] Q.P.; Cottier [1669] L.P..

²Caine [1648] L.S..

³Cottier [1668] L.C..

⁴See BRACON, op.cit., 414; COKE III, (1644) Ch.15.

⁵Implicit in Wife's Case [1570] Q.P..

⁶Wife's Case [1570] Q.P..

⁷Arson Case [1583] L.S..

⁸At least in part - see Wife's Case [1570] Q.P..

⁹Herring Fishing Act 1610 s.7 [o]; Larceny and Other Offences Act 1629 s.4,5 [o;o]; see also Read [1663] L.P.; Unwholesome Meats Act 1673 s.3 [o]; Trespass and Petty Larceny Act 1748 s.4,5 [o;o]; Trespass Act 1753 s.3,4 [o;o].

¹⁰See p.163.

¹¹Code 1817 s.13,20 [o;o]; see Kermode & Hudgeon [1825] L.P.. The felonies differed according to whether or not the building was occupied at the time. See also Criminal Law Amendment Act 1835 s.5-8 [o]; Cain & Crellin [1847] L.P..

¹²Code 1817 s.28 [o].

area were based on English models ¹. Additionally, after 1864 a number of statutory offences dealing with minor damage to property were triable in the Courts of Summary Jurisdiction ². The Imperial statute creating special felonies concerning criminal damage in one of Her Majesty's Dockyards also extended to the Isle of Man ³.

Fraud

By English common law, the misdemeanour of cheating was defined as "defrauding by means which are or may be injurious to the public generally, as e.g. by the use of a false weight or measure. This did not apply to false representations of facts made to individuals" ⁴. The three heads of deception recognised in the Manx cases can be reconciled with this definition. First, if a vendor sold goods "twice to several persons" ⁵ he was liable to the stocks and a fine. Second, if a merchant made a false statement to a merchant stranger, in order to exclude them from the Manx market, he was liable to a fine ⁶. Third, if an individual misused an authority issued by a judicial officer he was liable to a fine ⁷.

After 1797 many forms of deception were criminalised by statute. The majority of these statutes were closely modelled on equivalent English statutes ⁸, but a number of sections were

¹Code 1872 s.84-88,90,96-100,102,104-106,108,110-120,122-126,128,129,132,134 [1861/97/1-5,6,9,11-15, 17,20,21,23,26, 28-33,o,35,o,o,36,37,39-43,45,46,49,50]; Ramsey [1978] Law Society Library; Pasmore [1971] Law Society Library; Caine [1878] Law Society Library; Criminal Damage Act 1981 s.1 [1971/48/1]; Halsall [1984] Law Society Library; Langton [1986] Law Society Library.

²Summary Jurisdiction Act 1864 s.3,9 [1848/42/1;o]; re-enacted by Petty Sessions and Summary Jurisdiction Act 1927 s.57,62 [1851/92/2,9].

³12 Geo.3 c.24. In the United Kingdom this provision was repealed by 1971 c.49. This later Act does not appear to have extended to the Isle of Man, however, and it could thus be argued that this offence remains in the Isle of Man.

⁴STEPHEN J.F.,*op.cit.*, (1883) iii.161.

⁵Vendor's Case [1567] Q.P.; Larger [1657] L.S.; Vendor's Case [1695] L.S.; see also Shimmin [1724] L.P..

⁶Vinch [1627] L.P..

⁷Governor's Case [1600] L.S.; Deemster's Case [1584] Q.P..

⁸Forgery, Perjury and Cheating Act 1797 s.3 [1757/24/1]; Code 1817 s.25 [1757/24/1]; Code 1872 s.206,213,214,217-221,224-5,345 [1837/36/31; 1861/96/76-77,80-4,88-9; 1845/109/17]; Larceny Act 1946 s.20-22,32 [1916/50/20-22,32]; Falsification of Accounts Act 1968 s.1 [1875/24/1]; Theft Act 1981 s.14,15,17-22 [1968/60/15,16; 1978/31/2,3; 1968/60/17-20]; Criminal Code Amendment Act 1886 s.5 [1885/69/3]; Sexual Offences Act 1937 s.3 [1956/69/3]; Fraudulent Mediums Act 1952 s.1 [1951/33/1]; See Waterson [1979] Law Society Library; Long [1979] Law Society Library; Hartley [1979] Law Society Library; M'Loughlin [1981] Law Society Library; Reddin [1983] Law Society Library; Nelson [1902] Law Society Library; Rididale [1878] Law Society Library

novel ¹. The most important novel provision in this area was the offence of obtaining credit by deception. The Theft Act 1981 was almost entirely based upon the English Theft Acts of 1968 and 1978, which were expressly referred to throughout the Manx statute. Section sixteen however provided for obtaining credit by deception, in terms based upon the recommendations of an English Committee, whose recommendations did not actually become law. In 1985 this misdemeanour was replaced with that of obtaining services by deception ², based on the provision contained in the English Theft Act 1978 ³. Additionally, after 1872 a number of statutory provisions, largely based on English models, prohibited impersonation of others ⁴.

As well as cheating, customary law recognised three offences of forgery of varying severity. First, it was treason to forge an Act of Tynwald ⁵ or other "writinge ... of considerable regard" ⁶, although not a token from a court officer ⁷. This offence was analogous to the English statutory treason of forging royal seals, although of wider scope ⁸. Second, it was felony, as in England ⁹, to fraudulently deface any record or register ¹⁰. Third, it was misdemeanour to forge private legal documents ¹¹.

In 1797 the statutory misdemeanour of forgery was created on the English model ¹², and the area became defined by statutes based on English models ¹³.

¹Code 1872 s.80,177,349; Theft Act 1981 repealed all the above except s.349, which was replaced by the Criminal Law Act 1981; Criminal Code Amendment Act 1914 s.3 amending Code 1872 s.213; repealed by Larceny Act 1946. See also Prevention of Corruption Act 1908 s.3 [1906/43/1(1)]; Corruption Act 1986 s.1 [1906/34/1].

²Criminal Law Amendment Act 1985 s.2, amending Theft Act 1981 s.16.

³1978 c.31 s.1. See also Evidence Act 1965 s.2.

⁴Code 1872 s.243,331 [o;o]; Criminal Code Amendment Act 1886 s.12 [1885/69/4]; Sexual Offences Act 1967 s.1(2) [1956/69/1(2)]; Police (Isle of Man) Act 1962 s.2 [o]; Police (Amendment) Act 1980 s.1 [o].

⁵Clark [1596] L.S..

⁶PARR, 54.01.

⁷See M'Gawnus v Browne [1418] Q.P..

⁸1 Mar.sess.2 c.6.

⁹Stated in 1 Hen.5 c.3.

¹⁰Declaration of 1735 L.S.

¹¹Declaration of 1595 L.S.; PARR, 54.02; Norris [1657] L.S.; Bridson [1603] L.S..

¹²Forgery, Perjury and Cheating Act 1797 s.1 [1729/25/1].

¹³See Lowney [1812] L.S.; Code 1817 s.16,17 [1729/25/1]; Garrett and Oates [1818] L.P.; Johnston [1818] Weekly Gazette 10 September; Code 1872 s.268,269,272,274,276-9 [1861/98/27,28,30,32,35-38]; cf. s.271; Code 1872 s.242,245,246 ,260-262,266,267,270 [1861/98/3,4,7,20-22,25,26,29]; Code 1872 s.263,279

Theft and Related Offences.

By customary law, theft, which could be either misdemeanour or felony, consisted of taking and carrying away ¹ property belonging to another ² without leave or authority and with the intention to steal ³. In order to constitute felony the property stolen had to be valued at over 6d ⁴ - below that value the crime was misdemeanour ⁵. In English law the limit was 12d, but the principle was the same ⁶. It was suggested by no less an English authority than Coke that, in the Island, "if a Man steal a horse, or an oxe, it is no felony, for the offender cannot hide them, but if he steal a capon or a pigge, he shall be hanged" ⁷. Certainly, an early Manx statute provided that theft of, *inter alia*, a pig, was felony without valuation ⁸, but it is improbable that the larger, and more valuable, livestock were excluded from the statute ⁹. In 1629 the distinction between grand and petit larceny was given statutory force, and some offences declared grand larceny regardless of valuation ¹⁰.

An interesting related area is how Manx customary law dealt with those who retained goods which they found, rather than those who actually took goods. Deemster Parr treats this as normal theft, with a special procedure for establishing the mental element:

"if any mann find any thinge that is cast or left in the highway or open fields (if it be of the value [of felony]) and shall not reveal the same by publicacon at the Parish church or

[1861/98/23,38]; Forgery Act 1952 s.2-5,7,9-11 [1913/27/2-5,7,9-10; 1925/86/36(1)]; see Shimmin [1979] Law Society Library; Walton (1988) 11 Manx L.B. 54.

¹See Bell [1418] Q.P.; M'Curleod [1502] Q.P.; Callow [1633] L.P.; Davies [1746] L.P.; Clarke et al [1781] L.P.; Swines Case [1542] Q.P. and Cutpurses Case [1577] Q.P. provide contrast while not standing against the other cases. For authority that mere unauthorised use did not suffice, see Mare's Case [1596] L.P..

²Quine [1701] L.P.; Felon's Case [1544] Q.P.; Forfeiture Case [1570] Q.P.; Pinfolders Case [1609] L.P.; Pawnes Case [1632] L.S.; Cowle [1812] L.S.; 31 & 32 Vict. c.116 s.1.

³See PARR, 14.04; M'Cauley and Others [1831] Manx Star 11 January; Manx Sun 1 March; COKE III, (1644) Ch.47.

⁴See Bell [1418] Q.P.; Cashen [1517] Q.P.; Cutpurses Case [1577] Q.P.. This exact figure is drawn from implications in the Larcenies and Other Offences Act 1629 s.3 [o].

⁵Clipped Sheep [1618] L.S. cp. Creggan [1648] L.S.; cf. Swines Case [1542] Q.P..

⁶See BRACON H. de, op.cit., 425; FLETA, op.cit., Ch.36.

⁷COKE IV, (1644) Ch.69.

⁸Larcenies and Other Offences Act 1629 s.1-3 [o]; Swine's Case [1542] Q.P. could be interpreted as indicating the existence of a similar rule by customary law.

⁹See JOHNSON J., op.cit., (1811) 44.

¹⁰Larcenies and Other Offences Act 1629 s.1-3 [o]; See Bell [1683] L.P.; cp. Swines Case [1542] Q.P.; Martin [1642] L.P.; Mason [1644] L.S.; Petty Larceny Case [1675] L.S.; Shimmin [1691] L.P.; Lewney [1817] L.P..

markett where such a thinge is found; But shall feloniously conceal the same, it is to be reputed felony" ¹.

Authority indicates that this overstates the case. Retaining goods - generally livestock - found on the highway, or fields, without having them called at church, even if the goods were taken openly and with the knowledge of neighbours ², was punished as misdemeanour rather than felony. The absence of a valuation phrase in the cases is indicative that such keeping of sheep remained misdemeanour even after valuation was abolished for sheep in 1629, and all such thefts became felony ³. Accordingly, while the misdemeanour is worthy of note, the law in this area is not significantly different from that of England ⁴.

The Code of 1817 retained the distinction between petit and grand larceny, the latter being the theft of goods valued at 10s, or a sheep ⁵. In 1832 a separate offence of sheep-stealing was created ⁶. After 1864 this area was governed by statutes based on English models ⁷.

Robbery.

Turning to aggravated forms of theft, in *Proker* the defendant was arraigned for "the plunder [of 14d from V] ... upon the highroad itself" ⁸. The emphasis upon the highway in that, and other cases, could be taken to indicate that the aggravating feature was the location of the offence upon the Lord's Road ⁹. This would neglect the importance of establishing the facts of

¹PARR, 50.04.

²Creer [1643] L.S..

³See Corken [1641] L.S.; Carrett v Cottier [1642] L.P..

⁴See also, for completeness, Bell [1418] Q.P.; Wrecks Case [1702] L.S.; cp. Christian [1702] L.S.; Treasure Trove [1533] Q.P.; Beasts Cases [1535] Q.P., [1540] Q.P., [1544] Q.P., [1566] Q.P.; Porpoise Case [1587] Q.P.; Gill [1619] L.P.; Dawson [1620] L.S.; Tubman [1628] L.P.; Cowne [1666] L.S.; Knaikill [1670] L.S.; Puffins Case [1700] L.S.. These cases have analogs in English law - see BRACTON. 338-9.

⁵Code 1817 s.13,27 [o]; Cannell [1723] L.P.. This sum could be made up by multiple items stolen, but only if stolen at the same time - see Nowlin v Baines [1836] Manx Sun 14 October.

⁶Criminal Law Amendment Act 1832 s.2,3 [o].

⁷Larceny and Embezzlement Act 1864 s.1-4 [1861/96/67-70]; Code 1872 s.137,138,145,146,157-164,189,190, 192,203,204,211 [o;1861/96/3,10,11,27-32,38,39,60,61,63; 1837/36/26,27; 1861/96/74]; Code 1872 s.197-200,203 [1861/96/67-70; 1837/36/26]; Code 1872 s.147-152,195,196,212 [1861/96/17,20,21 ,23,24,65,66,75]; Kay [1889] Law Society Library; Larceny Act 1946 s.2-4,6-19 [1916/50/2-4,6-19]; Halsall [1978] Law Society Library; Alexander [1980] Law Society Library; Theft Act 1981 s.1-7,11-13 [1968/60/1-7,11-13]; Bridson & Shimmin [1986] Law Society Library; Parry et al [1961-1971] Manx L.R. 298.

⁸Proker [1417] Q.P..

⁹See Kneene [1724] L.P.; Shimmin [1781] L.P.; Coleman [1812] L.P.; Clarker [1781] L.P..

an accusation in the arraignment, and, as the later case of *Lord*¹ indicates, emphasis upon the location of the attack does not mean a particular location is required to establish robbery. The key element in robbery was not the location of a theft from the person², but rather that it was accomplished "by strong hand and mastership"³ - that the defendant put the victim of the robbery in bodily fear, allowing the defendant to steal the goods in question⁴. The law in this area was identical to that of England and, as in England, robbery was felony without valuation⁵.

The first Code defined the felony of robbery as:

"the felonious and forcible stealing, taking and carrying away from another person of goods, money or other personal property, of any value whatsoever, by violence or putting such person in fear"⁶.

After the creation of the felony of aggravated robbery in 1852, the offence of robbery was defined by statutes based on English models⁷.

Burglary.

Burglary most often occurred in Manx cases as an aggravated form of theft, although it could also be committed as an aggravated form of other offences, or as a distinct offence in itself. The customary felony consisted of unlawful entry during prohibited times, into a building belonging to another, with a felonious intent. An unlawful entry could be effected by breaking into the property⁸, for instance, through a bolted door⁹. Additionally, customary law provided special protection for those houses which made use of bundles of gorse to protect the houses doorways:

"At the first when the noble and worthy Sir John Stanley did possess the Island of the Isle of Man, the tennants haveinge then noe certaine tenure, but takinge their farmes from the Lords Officers for some small number of years the rentes then falling and risinge and at noe certainty (as now they are) but as the said Officers contracted with the tennants. Soe that the inhabitants did build noe houses, nor bestowed any changes for the betteringe of their tenements, but such as of necessity they must use; and therefore they provided noe windowes nor doores for their said houses, but made bundles of briers, gorse or heath (as some poor people at this time use), and therewith made up the doore to defend them from

¹Lord [1822] L.P..

²See also *Kelly v Lawson* [1735] L.P..

³See *Kneene* [1729] L.P.; *Coleman* [1812] *Manx Advertiser* 29 February.

⁴*Clarke et al* [1781] L.P..

⁵BRACTON H. de, *op.cit.*, 414-414; COKE III (1644) Ch.16.

⁶Code 1817 s.14 [o]; *Siddleton et al* [1832] L.P..

⁷Capital Punishment Act 1852 s.4 [1837/87/1-3]; Code 1872 s.165 [1861/96/40]; *Roberts* [1878]; Larceny Act 1946 s.23 [1916/50/23]; *Lunney* [1973]; Theft Act 1981 s.8 [1968/60/8]; *Kneen* [1987] Law Society Library.

⁸See *M'Kelly* [1527] Q.P.; *Callow* [1633] L.P.; *Clucas* [1735] L.P..

⁹See *Keowne* [1682] L.P..

the injury of the weather and invasion of thieves. And in regard their strength, fences and fortificacon of their houses were such and soe weak; It was provided by a law that whosoever did presume or attempt to open any of their said doors soe made up, or enter into any of their said Houses, without the knowledge of the owner, and did not first speak unto and salute and after ask leave for comming and entering in, the mann or woomann that did soe offend in that case should bee houlden and reputed as a fellow, (and guilty of burglary) and this law doth continue and is in use at this present, beinge the ancientest customary law of this isle." ¹

This rule, possibly related to the ancient English rule that a man was presumed to be a thief if he travelled through a wood without shouting or blowing his horn ², may have prevented the early establishment of a breaking in requirement, such as existed in early English law ³. Earlier authorities indicate the possibility of unlawful entry by stealth ⁴, but by 1735 a *de facto* breaking in had become, as in England, an essential part of the unlawful entry ⁵.

Most English authorities restricted the crime to nocturnal wrongdoing ⁶. The Manx authorities are mixed ⁷ but the reference by *Deemster Parr* to those who "come in an unseasonable time" ⁸ indicates that by the start of the eighteenth century this requirement was established ⁹.

The buildings protected by the customary offence included dwelling houses occupied by persons ¹⁰, temporarily unoccupied buildings and barns ¹¹, and churches ¹², but not shops ¹³. The law in this area appears identical to that in England ¹⁴.

¹PARR 18.01.

²STEPHEN J.F., *op.cit.*, (1883) 612.

³COKE III, (1644) Ch.14.

⁴See PARR 18.01, 18.02; see also Caine [1660] L.S. cf. Stephan [1657] Q.P..

⁵See Kewney [1677] L.P.; Comish [1693] L.P.; Kelly and Lawson [1733] L.P.; Clucas [1735] L.P.; Gelling et al [1735] L.P.; cp. Waterson [1786] L.P.; Lewin [1801] L.P.. This is a possible explanation for Cannell [1882] Manx Advertiser 29 February, where no actual breaking in seems to have occurred, and a sentence indicating a conviction for petty larceny was imposed.

⁶STEPHEN J.F., *op.cit.*, (1883) iii,150; COKE III, (1644) Ch.14.

⁷Compare Callow [1633] L.P.; Quayle [1611] L.S.; Kinred [1674] L.P.; Caine [1660] L.S. with Cregart [1533] Q.P.; Gell & Shimmin [1702] L.P.; Clucas [1735] L.P..

⁸PARR 18.02; cf. CHALONER J., *A Short Treatise on the Isle of Man*, (1656) *Manx Society* 10,1 at 37.

⁹See Cowley [1813] L.P.; Lewney [1817] L.P..

¹⁰Cregart [1533] Q.P.; Callow [1633] L.P..

¹¹Burglars Case [1584] L.S.; Caine [1660] L.S.; Harrison [1699] L.P.; cf. Cowley [1813] L.P..

¹²See M'Kelly [1527] Q.P..

¹³Lowey [1673] L.P..

¹⁴COKE III, (1644) Ch.14.

Finally, turning to the mens rea the most common case of burglary would be made out by proving an actual theft of goods, whether that theft was felony or misdemeanour ¹. The commission of some other felony would suffice ², as would an intent to commit theft or a felony ³. If none of these intents existed, burglary could not be made out, although punishment as in misdemeanour could follow for the unlawful entry ⁴.

The first Code defined the felony of burglary as breaking and entering into another's dwelling house by night with intent to commit felony, such house then being inhabited ⁵. The Code also created the misdemeanours of forcible entry and possession ⁶. After the creation of the felony of aggravated burglary in 1852, the statutes governing this offence were based on English models, except insofar as forcible entry and possession is concerned ⁷.

Handling of Illegally Acquired Property.

At customary law knowingly to receive feloniously acquired goods was itself felony ⁸, while receipt of goods acquired by misdemeanour was an offence of like nature ⁹. The Code of 1817 essentially restated the customary law on receiving stolen goods ¹⁰, but the Code of 1872

¹See Callow [1633] L.P.; Quayle [1611] L.S.; Caine [1660] L.S.; Kewney [1677] L.P.; CHALONER J., *op.cit.*, (1656) 35-39.

²Authority is weak - see Cregart [1533] Q.P.; Kinread [1674] L.P..

³PARR 18.02; Burglars Case [1584] L.S..

⁴Cowley [1657] L.S..

⁵Code 1817 s.12 [o]; see Browne [1818] L.P.; Roxborough [1838] L.P.; Sharples [1839] L.P.; Kelly [1824] *Mona's Herald* 24 March.

⁶Code 1817 s.39,40 [o].

⁷Capital Punishment Act 1852 s.3 [1837/86/1-3]; Code 1872 s.178-180,183-187,333,334 [1861/96/50-51, 54-58;o;o]; Todd [1880]; Larceny Act 1946 s.24-27 [1916/50/24-27]; Cowell [1980] Law Society Library; Theft Act 1981 s.9,10 [1968/60/9,10]; Costello [1985] Law Society Library; Downes [1983] Law Society Library; Vagrancy Act 1896 s.2 [1824/83/4]; Quirk [1961-1971] *Manx L.R.* 227.

⁸Corrin [1577] Q.P.; Waterson [1602] L.C.; Cannon [1734] L.P..

⁹See Cowne [1666] L.S.. At English common law receipt of stolen goods was not a specific criminal offence although this was later changed by statute - 3 Will. & Mar. c.9.

¹⁰Code 1817 s.19 [o]; see Hartigan [1823] L.P.; Code 1817 s.33 [o].

entirely adopted English statutory models in this area ¹. Later statutes implemented English innovations, culminating in the misdemeanour of handling stolen goods ².

As well as these main offences customary law, and later statute, provided special rules of proof and offences to deal with receivers of stolen mutton ³.

¹Code 1872 s.195,205,227,231 [1861/96/65,66; 1837/36/30; 1861/96/91,95]; see Rowney [1879] Law Society Library.

²Larceny Act 1946 s.33 [1916/50/33]; Theft Act 1981 s.24(1) [1968/60/22]; see Cowell [1980] Law Society Library.

³ Crellin [1676] L.P.; Kinred [1682] L.P.; Corkill [1674] L.P.; Goods Case [1552]; PARR, 50.07; Skin's Case [1623] L.S.; Kneene [1647] L.S.; Sheep Stealing Act 1857 s.1,2 [o;o]; Petty Sessions and Summary Jurisdiction Act 1927 s.58 [1851/92/4].

Chapter Fourteen: Offences Against The State.

In this section we consider those offences aimed directly against the organisation of the State, or vital state resources. Once again, the offences are ranked in increasing severity.

Restrictions on Emigration.

By customary law any inhabitant of the Island, even the Officers ¹, and Keys ², required a licence to leave the Island. Leaving the Island without licence ³, or taking an unlicensed person off the Island ⁴, was misdemeanour. Leaving the Island in one's own boat, or in a stolen boat, was felony ⁵. In 1736 these laws were replaced, with regard to the carrier of unlicensed persons, by a statutory fine ⁶. Restrictions on emigration were removed in 1836 ⁷.

Currency Offences.

Offences related to currency were unknown to customary law, but in 1646 it was declared treason to "falsifie, forge, and contereit, clip or diminish any kind of current coyne, [or to] bring false money into the Island counterfeit to such current money as aforesaid, knowing the same to be false, and [to] make payment thereof" ⁸. English common law probably recognised coining as treason, and many statutes dating from before the Manx ordinance had developed the offence ⁹. The Code of 1817 essentially re-enacted the customary treason of coining ¹⁰, but

¹See Deemster's Case [1604] L.S..

²See Keys' Case [1616] L.S..

³Customary Laws 1422 s.3; Customary Laws 1417 s.4; False Pass [1663] L.S..

⁴Customary Laws 1422 s.52; Customary Laws 1417 s.3; Servants Act 1664 s.3; Servants Case [1496] Q.P.; Servants Case [1609] Q.P.; Mariners Case [1612] L.S.; Bridson [1720] L.S.; Debtors Case [1763] L.S.; Mariners Case [1781] L.S.; Mariners Case [1818] L.S.; AG v Peggy [1802] L.S..

⁵Customary Laws 1417 s.4; Cashen [1517] Q.P..

⁶1737 c.9 [o].

⁷Until the nineteenth century prosecutions were still occurring in this area - see CRAINE D., Mannanan's Isle, [Douglas] (1955) 36-48. As late as 1831 public notices were being issued indicating that the law would be enforced - see [1831] Manx Sun 2 February.

⁸Coining Offences Ordinance Act 1646 (missing the Deemsters' signature); see Wilson [1723] L.S.; Copper Coinage Act 1710 s.10; Copper Coinage Act 1733 s.2; Wilkes & Wilkes [1723] L.S.; Report of the Lords of the Committee on Manx Copper Coinage, 2 June 1797 [P.C. 1/38/121].

⁹See STEPHEN J.F., op.cit., (1884) iii.177-9.

¹⁰Code 1817 s.6 [o]; Lyons [1828] L.P.. On Lyons, see Lieutenant-Governor Smelt to Peel, 14 June 1825 [Letterbooks 3, 394].

later statutes based on English models replaced this single offence with a plethora of felonies and misdemeanours ¹. Parliament also legislated in this area ².

Official Secrets. ³

The protection of official secrets under customary law was extremely limited ⁴, and was not reinforced until the late nineteenth century. In 1890 Tynwald passed an act to protect official secrets, based upon an English statute ⁵. In 1912 this statute was repealed ⁶, and the Imperial legislation in the area automatically came into effect ⁷. After 1912, this area was dealt with by Imperial legislation ⁸.

Sedition.

Another category of offences, which may come under the blanket term of sedition, concerned erosion of the authority of the lawful Government of the Island, not amounting to treason. We shall consider the topic under three heads.

Firstly, after 1601 it was a misdemeanour to slander any of the Keys or Council ⁹ regarding their oath, or the state and government, or in terms which might lead to the defamation of their office and place ¹⁰. This statute appears to be an adaptation of the then current English law ¹.

¹Code 1872 s.247-9,251-3,255-8,288-309 [1861/98/8-10,12-14,16-19; 1861/99/2-23]; Counterfeit Currency (Convention) Act 1938 [1935/25/3; 1936/16/8]; Coinage Offences Act 1980 s.1-9 [1936/16/1-9]; cf. Criminal Law Amendment Act 1832 s.15 which reduced importation with intent to utter to misdemeanour

²See also 2&3 Will.4 c.34; 16&17 Vict. c.48; 22&23 Vict. c.30; 14&15 Vict. c.99; 31&32 Vict. c.37 s.4; 45&46 Vict c.9 s.3.

³See Final Report of the Select Committee on Freedom of Information Legislation, [Douglas] (1995).

⁴See COLUMNIST, "Espionage in the Isle of Man", [1963] Isle of Man Courier 31 May; Customary Laws 1422 s.26; COKE II, (1644) 121.

⁵Official Secrets Act 1890 [1889/52].

⁶Official Secrets Act 1912.

⁷See Lieutenant-Governor to Home Office, 8 November 1911 [P.R.O. - H.O. 45/10501/120695]. See 52&53 Vict. c.52; S.I. 30/6/1889.

⁸1&2 Geo.5 c.28; 10&11 Geo.5 c.75; 2&3 Geo.6 c.121; 1989 c.6. See S.I. 1992/1301.

⁹The text refers to "Chief Officer".

¹⁰Defamation Order 1601 (not validly enacted since it received the assent only of "so many of the 24 together as were then present"); confirmed by the Defamation Act 1647; see Crow [1612] L.C.; Shawcross [1668] L.S.; Stevenson [1759] L.S.; Fitzsimons [1792] L.S.; Petition of 1700 L.S.. The case of Christian [1643] L.S., while difficult to place exactly, almost certainly fell under this statute.

In 1867 the broad offences were replaced with a narrower statutory provision limited to libel of certain officials ². The more important modern offence, dating from 1796 and similar to the English law, was the high misdemeanour of doing any act or using any expression tending to bring into hatred or contempt the peace, government or lineage of the Sovereign ³.

Second, customary law punished as felony a refusal to accept the declaration of law by the Deemster ⁴, or to scandalise the Deemster and laws ⁵. By 1681 the scandalising of the Deemster ⁶, or statutes ⁷, had declined to misdemeanour ⁸.

Third, at customary law it was misdemeanour to take or give an unlawful oath ⁹. In 1872, in a statute based on the English model, the offence was elevated to statutory felony ¹⁰.

Treasons.

As would be expected, the English vassals ruling the Island adopted the English models in this area ¹¹. The four main heads of treason in English law were planning the death of the ruler ¹², levying war against the ruler, adhering to the rulers enemies ¹³, and "accroaching royal power" ¹⁴. The Manx cases fall, with some modification, into these categories.

¹See *De Libellis Famosis* (1606) 5 Co.Rep. 125A; *Harrison* (1678) 3 Keble 841; *Justice Huttons Case* (1639) *Hutton* 131; *HOLDSWORTH W.*, *op.cit.*, v 207-212, iv 511-12, viii 336-346, iii 409-10; *STEPHEN J.F.*, *op.cit.*, (1883) iii 298-396.

²*Tynwald Proceedings Act 1876* s.6 [o].

³*Security of the Sovereign Act 1796* [o]; *Code 1872* s.13 [o].

⁴*Mould* [1498] Q.P..

⁵*Defamation Case* [1529] Q.P..

⁶*Quay* [1722] L.S..

⁷*Statute Case* [1681] Q.P..

⁸Other cases of minor importance in this area are *Abbott of Rushen* [1520] Q.P.; *Corkill* [1612] L.C.; *Crow* [1612] L.C.; *Vicar of Malew* [1721] L.S..

⁹See *Carrett* [1643] L.S..

¹⁰*Code 1872* s.315,316 [1812/104/1,1].

¹¹See 5&6 Edw.6 c.11; 1 Eliz.1 c.5; 14 Eliz.1 c.6; 17 Geo.2 c.39; 1 Geo.1 st.2 c.13 which have extended to the Isle of Man.

¹²See 23 Edw.3 c.5.

¹³*BRACON H. de*, *op.cit.*, 258.

¹⁴*STEPHEN J.F.*, *op.cit.*, (1883) ii. 251-2.

First, the Lord was rarely present in the Island, instead exercising power through a Governor and other officers. A large number of cases accordingly are concerned with protecting the Governor and his men from violence ¹ - fully analogous with the first head above ².

Second, raising an insurrection against the Government of the Island was treason ³. As well as straight-forward military force, attempting to coerce the Governor in his duties, analogous to the English case of *Essex* ⁴, constituted treason ⁵.

Third, adhering to rebels, or failing in appointed military duties, could constitute treason ⁶.

Fourth, a small number of cases may represent accroaching royal power ⁷.

Deemster Parr suggested a fifth head of treason, committed when an Englishman was reputed an alien ⁸, but the authority upon which he relied is better viewed as relating to the forgery of statutes.

In some circumstances, as in England, treason could be committed by word rather than deed ⁹.

From 1645 the law in this area began to take on statutory form. In that year the treason of practising any deceit against the Governor was extended so "that whosoever pretendeth or practiceth any evil or hurt to the prejudice of the Lord, or the Governor or Government of the Island...shall forfeit as in case of treason." ¹⁰.

The Codes of 1817 and 1872 provided a complete list of treasons almost identical to the provisions in effect in England ¹¹. The only innovation was the treason of slaying Governor,

¹Whetstones [1598] L.S.; M'Cawley [1430] Q.P.; M'Issacke [1422] Q.P.; M'Cowley [1422] Q.P.; M'Carrayne [1422] Q.P.; M'Craine [1422] Q.P.; M'Christie [1422] Q.P.; Customary Laws 1417 s.14; Customary Laws 1422 s.14,15,19,21.

²Consider 23 Edw.3 c.5.

³Christian [1663] L.S..

⁴Lord Essex [1600] 24 St.Tr. 1353.

⁵M'Christie [1422] Q.P.; Customary Law 1422 s.16,17,19.

⁶Customary Law 1422 s.23; Constables Case [1420] Q.P.; Constables Case [1426] Q.P.; Constables Case [1426] Q.P.; see also Comptrollers Case [1426] Q.P..

⁷Comptrollers Case [1420] Q.P.; M'Cawley [1430] Q.P.; Customary Laws 1422 s.16,19,22; Taylor [1588] L.P.; Customary Laws 1417 s.1. See also Galloway [1601] L.S.. Consider also Quilliam [1696] L.S..

⁸PARR, 3.02.

⁹Christian [1644] L.S.; 2 Ric.2 st.1 c.5; 12 Cha.2 c.1; Gordon (1781) Doug 593.

¹⁰Customary Laws 1645 s.8; see Customary Laws 1422 s.20.

¹¹Code 1817 s.1-6 [1350/5/2]; Lyons [1828] L.P.; Code 1872 s.2-4 [o].

Council, Deemsters or Keys ¹, reduced to killing of the Governor by the later Code ². The later Code also created a number of treason felonies based on the English model ³.

¹Code 1817 s.1-7 [1350/5/2]; Lyons [1828] L.P.; Code 1872 s.2-4,6 [o]

²Code 1817 s.5 [1350/5/2].

³Code 1872 s.8,11,12 [1848/12/3; 1797/70/1; 1842/51/2].

Chapter Fifteen: Offences Against the Peace.

This chapter discusses those offences primarily intended to preserve public peace and order.

Breach of the Peace.

By customary law breaches of the peace were prevented by requiring a malefactor to enter into a recognisance to keep the peace towards the populace of the Island and/or named persons ¹. In the event of the malefactor breaching the peace, so that individuals actually came to blows ², the sum stated in the recognisance was forfeited ³. There is some evidence that such a breach of the peace also constituted a misdemeanour, but prosecution was unusual ⁴. Additionally, it was felony to breach the peace at Tynwald Market after it had been fenced ⁵. Apart from the offence committed at Tynwald, the law in this area is identical to that in England ⁶. In 1661 it was declared to be misdemeanour to make use of provoking language which could cause battery ⁷.

The Code of 1817 left the law relating to breach of the peace largely unchanged ⁸. In 1836 the substantive offence was replaced with the misdemeanour of using provoking language tending to a breach of the peace ⁹, and this definition was largely repeated in 1864 and 1927 ¹⁰. The later statutes were based on English models.

Vagrancy.

A continual threat to public order was the existence of an impoverished underclass ¹¹. Customary law dealt harshly with vagrants and vagabonds. By the earliest customary law,

¹See M'Wanty [1418] Q.P..

²Deemster's Declaration of 1584 L.S..

³Barry [1625] L.P..

⁴Contra Pacem [1502] Q.P..

⁵M'Teare & M'Clure [1500] Q.P.. See also Market's Case [1546] Q.P. where a drawing of arms in the common market after it was fenced was only misdemeanour.

⁶See COKE III, (1644) Ch.72.

⁷Turf and Ling Act 1661 s.4 [o]; see *Lace v Taubman* [1776] L.S.; *Caine et al* [1663] L.S..

⁸Code 1817 s.43 [o].

⁹Justice Act 1836 s.43 [o].

¹⁰Summary Jurisdiction Act 1864 s.2 [1861/100/43-46]. Petty Sessions and Summary Jurisdiction Act 1927 s.56 [1861/100/43-46]; Langton [1980] Law Society Library; *Oake v Bibby* [1993] 20 Manx L.B. 48.

¹¹See Servants Act 1665 for an early reference to this area. Lieutenant-Governor Hope to Lutton, 27 May 1842 [Letterbooks 4,479].

they were liable to presentment and expulsion from the Isle ¹. Later, those unable to show that they were "blind, maimed or decrepit" were forced into service by the Servant's jury ². With the demise of the Servants Jury, this became defunct. Additionally, it appears that the customary law recognised an offence of being of a notorious demeanour in the neighbourhood ³. From a very early date drunkards were liable to punishment as in misdemeanour ⁴. The law in this area was the same in broad form as English law.

In 1896 a number of vagrancy misdemeanours were created - mainly concerned with behaviour in public places ⁵. The law in this area, though differing in some details, was the same in broad form as English law.

Riot.

The Code of 1817 placed riot and rout upon a statutory basis, as misdemeanours ⁶. The Code of 1872 essentially re-enacted these misdemeanours ⁷ and supplemented them with two statutory offences based on English models ⁸. Additionally, between 1826 ¹ and 1981 ¹ there existed a number of offences relating to proclamations to disperse, based on English models ².

¹Vagabonds [1505] Q.P.. Mariners who brought such into the Island were also liable to punishment - see for instance Customary Laws 1422 s.97.

²PARR, 13.03; Servants Act 1664 s.16, 19.

³Cormish [1673] L.S..

⁴See PARR, 45.01; Drunkenness Act 1610.

⁵Vagrancy Act 1896 s.2 [1824/83/3,4]; see also Vagrancy Act 1906 s.2 [1898/39/1(1)].

⁶Code 1817 s.38 [o]; Saddleton [1821] Mona's Herald 20 November.

⁷Code 1872 s.322 [o].

⁸Code 1872 s.96,97 [1861/97/11,12].

¹Riot Act 1826 (a temporary Act reenacted in 1836 - all references to the later Act); see Kelly [1841] L.S..

²Whole Act repealed by Criminal Law Act 1981 s.30.

³Riot Act 1836 s.1,3,5 [1714/5/1,3,5].

Chapter Sixteen: Offences Against Public Justice.

Customary law afforded special protection to the justice system against defiance, against corruption, and against coercion. This section discusses those safeguards, in particular, one of the most distinctive features of Manx criminal law, the punishment of negligent juries.

*Contempt of Court.*¹

By customary law the courts enjoyed a wide power to punish, as misdemeanour, those who disturbed the smooth running of the court² by, *inter alia*, leaving the court without permission³, uttering disrespectful words in court⁴, failing to perform a required duty⁵, or even wearing a hat in court⁶. Additionally, making an affray in court could, if sufficiently serious, constitute felony⁷. Customary law also provided for the punishment of those, not in the court itself, who resisted lawful exercise of power by officers⁸. The law in this area was similar in England⁹.

The Code of 1817 reserved the customary law power to punish for contempt of court, but provided for the misdemeanour of:

"malicious striking and making affray in any of the Courts of Justice of the Island; or the using threatening and reproachful words to the Judge or Court, the Judge or Court being then sitting"¹⁰.

This provision did not protect the legislature¹¹. The later Code repeated this provision¹², and in 1876 the legislature was protected by statute¹³.

¹See also Contempt Act 1737 [o].

²M'Curlett [1500] Q.P.; Craine [1656] L.P.; Callow [1656] L.P.; Crow [1675] L.S.; Preston [1700] L.S..

³Deputy Sergeant's Case [1610] L.P.M.R.; Cowle [1628] L.P.; Clague [1660] L.S.; Quayle [1661] L.S..

⁴Casement [1611] L.P.; Christian [1625] L.P.; Garret & Quay [1632] L.P.; Kane [1656] L.P.; Christian [1663] L.S.; Casement [1665] L.S.; Woods [1723] L.S.; see also Christian [1811] L.S.

⁵Kinvigg [1670] L.P.; Huddleston [1668] L.S.; Ratcliffe [1676] L.S.; Lace [1720] L.S.; Lace [1641] L.P.; Christian [1658] L.C..

⁶Kneale [1660] L.P..

⁷Compare Lantree [1556] Q.P.; Vinch [1633] L.P..

⁸See Declaration of 1582 L.S.; Lockman's Case [1613] L.S.; Cannell [1637] L.S.; Gremshire [1641] L.S.; Kissage [1663] L.S.; Tear [1670] L.S.; Customary Laws 1419 s.8; Customary Laws 1577 s.19.

⁹HOLDSWORTH W., *op.cit.*, iii.389-94; FOX J.C., *The History of Contempt of Court*, [Oxford] (1927).

¹⁰Code 1872 s.30,31 [o].

¹¹*ex p Brown* [1864] 122 E.R. 835 (P.C.).

¹²Code 1872 s.318 [o].

¹³See Tynwald Proceedings Act 1876 s.5 [o] which may well have been a mere affirmation of this power.

Prison-Breaking.

Two customary law offences existed in this area. Where the escapee was imprisoned awaiting trial for felony to escape from prison was itself a felony ¹. Where the escapee was imprisoned for misdemeanour or some other cause, the offence was mere misdemeanour ². Manx customary law was more flexible in this regard than early English law, which, per *Bracton*, provided that if those confined to prison should

"conspire to break their chains and break prison and escape, they are to be punished more severely than the reason for their consignment demands, that is, by the supreme penalty, even if they are found innocent of the crime for which they were imprisoned" ³.

In 1737 these offences were supplemented with the statutory misdemeanours of rescuing a prisoner, or aiding one in escaping from gaol ⁴, and helping a malefactor escape from the Island ⁵. Turning to prison breaking, both Codes created offences in this area, in neither case derived from English law ⁶. In 1965 a statute, based on an English model, replaced these provisions ⁷.

Perjury.

The prohibition of perjury is clearly important where the trial system is based upon testimony of witnesses ⁸. The offence was of wider scope than swearing the truth of an untruth, knowing it to be false ⁹, in court ¹⁰. Jurors could be punished for acting contrary to their oaths, as is detailed elsewhere ¹¹, as could executive officials ¹². Additionally, it was misdemeanour to suborn a witness ¹³. Manx customary law was similar to the doctrines developed in this area

¹Cullen [1634] L.P.; Garslett [1649] L.P.; cp. Norris & Lace [1686] L.S..

²See Coard [1648] L.S.; Callow [1694] L.S..

³BRACTON H. de, op.cit., 345-6.

⁴Gaol Act 1737 s.(1) [o].

⁵Gaol Act 1737 s.(2) [o].

⁶Code 1817 s.32 [o]; Code 1872 s.320, 322 [o].

⁷Prison Act 1965 s.26 [1952/52/39; 1969/39/22]; Custody Act 1995 s.4.

⁸See COLUMNIST, "On Perjury", [1808] Manx Advertiser 27 August; Customary Laws 1422 s.25; Garrett [1580] Q.P.; Gerrard [1586] L.P.; Bridson [1720] L.S.; Cowle [1722] L.S..

⁹Garrett [1580] Q.P.; Bloodwipe [1672] L.S.; Perjury Case [1695] L.S..

¹⁰Such oaths out of court may also have grounded a charge - see Perjury Case [1695] L.S..

¹¹See p.238.

¹²Wattleworth [1577] Q.P.; Crow [1582] Q.P.; Juror's Case [1685] L.S..

¹³Perjury Case [1584] Q.P.; Perjury Case [1684] L.S.; see also Preston [1700] L.S..

by the English Court of Star Chamber ¹, but with greater emphasis on the duties of officials. The latter was defunct in the Island, as in England, by 1671 ².

In 1797 the statutory misdemeanours of perjury and subornation of perjury were created in line with the English law, although not modelled on any particular statute ³. The first Code adopted an English statutory model ⁴, but the later Code, while not practically different, did not follow any English model ⁵. In 1952 this area was placed entirely in accord with English statutes ⁶.

Jury Offences.

Finally, turning to offences committed by jurors, Manx law retained a distinctive form into the nineteenth century ⁷. Customary law provided for the punishment of jurors both as individuals, and as a corporation ⁸. An individual juror who acted improperly could be punished by the court. Such improper behaviour could include usurping the role of other organs of the court ⁹, acting with a clear personal bias ¹⁰, or revealing the counsel of the jury ¹¹. All these offences fell within the English power of control over the jury ¹² although at one time the latter offence was prosecuted as felony ¹³. As well as being punished for acting falsely, an individual who refused to serve when called committed a misdemeanour ¹⁴. English

¹STEPHEN J.F., *op.cit.*, (1882) iii.240-248.

²See Declaration of 1671 L.S.; cp. Jurors Case [1685] L.S.; see COKE III, (1644) Ch.74.

³Forgery, Perjury and Cheating Act 1797 s.2 [o].

⁴Code 1817 s.23,24 [1757/24/1]. See Attorney General Gell to Lieutenant-Governor Loch, 3 June 1869 [Letterbooks 15,429].

⁵Code 1872 s.325-7 [o]; Evidence Act 1871 s.48 [o]; Hardman [1881] Law Society Library; Craine [1883] Law Society Library.

⁶Perjury Act 1952 s.1-7 [1911/6/1-7].

⁷ See EDGE P.W., "The Keys to the Star Chamber: Jury Freedom in England and the Isle of Man", [1993] Lancashire Law Review 33.

⁸See Bloodshed Jury [1543] Q.P.; Juror's Case [1577] Q.P.; Christian v Christian [1660] L.P.; Juror's Case [1555] Q.P..

⁹Cuan [1658] L.S.; Kinvigg [1670] L.S.; Ratcliffe [1676] L.S..

¹⁰Ratcliffe [1711] L.S..

¹¹Customary law 1422 s.26 shows a wider principle, of which this is the most important facet. See Juror's Case [1609] L.P..

¹²See HOLDSWORTH W., *op.cit.*, i.337-346.

¹³*ibid.*

¹⁴See Carron [1670] L.S.; Wattleworth [1781] L.P...

law also enforced attendance. One of the most striking aspects of Manx law, which endured long after it had ceased in England, was the corporate punishment of juries.

Before the seventeenth century a jury which entered its verdict contrary to law and out of malice was liable to punishment ¹. By 1601 the standard was whether they had given an erroneous verdict contrary to the evidence ². The most important cases in this area dealt with erroneous acquittals by juries in the Court of General Gaol Delivery ³, of which the most revealing is that of *Wilkes* ⁴. In that case it was found that the jury had given an erroneous verdict, but that the jury had acted out of a misunderstanding of the law rather than wilful error, and so should only be lightly punished. Thus, by this time ⁵, the standard was negligence rather than malice ⁶. Contrasting this offence with English law is useful ⁷.

The English writ of attainder did not run to the principal English criminal courts, but the Star Chamber did impose punishment where "a jury hath acquitted a felon or traitor against manifest proof ... [showing] ... partiality in finding a manifest offender not guilty" ⁸. During the seventeenth century the Star Chamber exercised this power very widely ⁹. After the abolition of the Star Chamber the normal courts exercised this power until 1670, when it ceased ¹⁰. Thus, Manx law retained and enforced the law more than one hundred years after it had been abandoned in England.

In 1737 additional statutory misdemeanours were created to regulate improper behaviour by juries ¹¹. With the rearrangement of the Court of General Gaol Delivery, punishment of

¹Two Jurors' Case [1519] Q.P.; Bloodshed Jury [1539] Q.P.; Re Norris [1576] Q.P..

²Court of General Gaol Delivery [1601] L.P.; see Negligent Jurors [1588] L.P.; Great Enquest of Glenfaba [1579] Q.P..

³See Carran [1664] L.P.B.; Kneen [1687] L.P.; Quin [1705] L.P.; M'Namees [1709] L.P.; Waterson [1733] L.P..

⁴*Wilkes* [1723] L.P..

⁵See Negligent Jurors [1588] L.P.; Caines Case [1645] L.P.; Traverse Jury [1697] L.S..

⁶A related corporate offence was refusal to hear all the evidence which the parties were entitled to present - see Bloodshed Jury [1720] L.S..

⁷See EDGE P.W., "The Keys to the Star Chamber - Jury Freedom in England and the Isle of Man" [1993] *Lancashire Law Review* 33.

⁸*Floyd v Barker* (1608) 12 Co.Rep. 23.

⁹See HOLDSWORTH W., *op.cit.*, i.337-346.

¹⁰See *Bushells Case* (1670) Vaughan.Rep. 135; GREEN T.A., *Verdict According to Conscience*, [London] (1985).

¹¹Jury Act 1737 c.10 s.(16) [o]; Great Enquest Act 1737 c. s.(14) [o].

negligent or wilful verdicts in that Court ceased ¹. The demise was accepted in relation to other juries also ². It is probable, however, that the customary law offence survived in legal theory, although it could not be prosecuted while the first Code was in effect ³. Statute codified this area somewhat. The statutory provisions dealing with improper behaviour by individuals were extended in 1817 ⁴, and in 1872 corrupt influence of juries was merged with the general offence of bribery of an officer ⁵. After 1832 refusal to serve on a jury, and related offences, were dealt with by statute ⁶.

¹See p.189.

²See Attorney General v Kelly [1822] Mona's Herald 23 March.

³See Deemster Christian in Kelly [1824] Rising Sun 25 May, Rising Sun 1 June.

⁴Code 1817 s.36 [o].

⁵Code 1872 s.319,323 [o].

⁶Jury Act 1832 s.13,14 [o]; Jury Act 1896 s.16,17 [o;1825/50/31]; Jury Act 1960 s.32,33 [o].

Chapter Seventeen: Offences Against Morality.

Before the nineteenth century many offences against morality, *per se*, were not punished by the Royal criminal courts. Instead, the ecclesiastical courts of this period ¹ dealt with a number of important offences which, accordingly, are not properly considered as criminal offences at that time. These included bigamy and incest ².

Bigamy.

Bigamy did not become a misdemeanour until 1817 ³. Manx law was considerably behind English law in this area, which had created a statutory felony of bigamy in 1609. The Code of 1872 increased the offence to felony, based on an English model ⁴.

Incest.

By the nineteenth century the ecclesiastical jurisdiction in incest was long defunct in both England and the Island, and the offence was converted to felony in 1913, by a statute based on the recent English model ⁵.

Indecent and Obscene Publications.

The law relating to indecent publications all dates from after Revestment ⁶. The Code of 1817 provided that the publishing of a malicious libel, or "the scandalous publishing of any obscene indecent and immoral picture, printing or writing" ⁷ was a misdemeanour. The later Code replaced this misdemeanour with one, based on an English statute, prohibiting the exposure of any obscene writing, print, picture or other indecent exhibition in a public place ⁸. This provision was supplemented with a similar vagrancy offence in 1896 ⁹, and then replaced in 1907 ¹⁰. In that year it was enacted that the printing, storage for publication sale or exhibition, or publication of any indecent or obscene book, paper, writing print or other representation

¹See p.194.

²Churchwarden of Malew v Kinley [1739] Q.P..

³Code 1817 s.44 [o]; Kelly [1838] Manx Sun 15 June.

⁴Code 1872 s.70 [1861/100/57].

⁵Punishment of Incest Act 1913 s.3-5 [1908/45/1-3]; Sexual Offences Act 1967 s.9,10 [1956/69/10,11]; Sexual Offences Act 1992 s.7-8 [1956/69/10(1);o].

⁶See COLUMNIST, "Police in naughty books raid", [1976] Isle of Man Examiner, 16 January.

⁷Code 1817 s.45 [o].

⁸Code 1872 s.343 [1824/83/4].

⁹Vagrancy Act 1896 s.2(4) [1824/83/4].

¹⁰Obscene Publications and Indecent Advertisements Act 1907.

was a misdemeanour ¹. Additionally, the display of any indecent or obscene exhibition or printing was declared misdemeanour ². While the latter provision was based on English law, the former was original, and considerably wider in scope than the English law ³.

Misuse of Drugs.

Before the first statutory offence was created in 1923 Manx law did not prohibit use of drugs other than in relation to poisoning. Offences concerning misuse of drugs are all based on English statutory models ⁴. The Manx courts have, famously, followed a distinctive policy in relation to sentencing for some offences committed against these Acts.

Interpretation of the drugs legislation relied largely upon the English case-law ⁵, but there are suggestions as early as 1977 that sentences for mere possession were harsher in the Isle of Man than in England ⁶. In 1978, a sentence of one month's imprisonment for possession of cannabis was affirmed by Deemster Luft who noted:

"The Courts here do not necessarily always follow closely the guidelines laid down by the Courts in England. The Courts in the Isle of Man have and, as it seems to me, rightly, recognised the potential danger arising from the unlawful holding of drugs of this class and have consistently imposed deterrent sentences for breaches of the drug laws" ⁷

This approach to possession of cannabis was stated most clearly in *Barlow* ⁸. A sentence of one month's imprisonment was confirmed by Deemster Luft who stated:

"In the Isle of Man, the Courts with reference to offences involving the possession of the drug cannabis resin have fairly consistently imposed custodial sentences ... it is the view of the Court that in cases involving the use of drugs there must be included in the penalty a

¹Obscene Publications and Indecent Advertisements Act 1907 s.2 [o].

²Obscene Publications and Indecent Advertisements Act 1907 s.4,5 [1899/18/3,4]; Postcard Censorship Act 1933 (repealed by Statute Law Revision Act 1989 s.1). Supplemented by Video Recordings Act 1995.

³See also the offences relating to public indecency, which were largely based on English statute law - Summary Jurisdiction Act 1864 s.10(17),(18) [1824/83/4]; Petty Sessions and Summary Jurisdiction Act 1927 s.63(16) [1824/83/4]; Vagrancy Act 1896 s.2(2) [1824/83/3]; Petty Sessions and Summary Jurisdiction Act 1927 s.63(15),(15A) as amended by the Summary Jurisdiction Act 1956 s.13.

⁴Pharmacy and Dangerous Drugs Act 1923 s.2-13 [1908/55/1-5; 1920/46/1-8,10]; Dangerous Drugs Act 1952 s.1-11,14 [1951/48/1-11,15]; Drugs (Prevention of Misuse) Act 1965 s.1,5 [1964/64/1,5]; Dangerous Drugs Act 1965 s.7,8 [1964/36/9-10]; Dangerous Drugs Act 1966 s.1-10,13 [1965/15/1-10,13]; Misuse of Drugs Act 1976 s.2-10,18 [1971/38/2-10,18].

⁵ See Wallis [1977] Law Society Library.

⁶ Martin [1977] Law Society Library; Barlow [1977] Law Society Library; Caveney and Trudinger [1978] Law Society Library.

⁷ Mandryk [1978] Law Society Library. Confirmed by Deemster Eason in Ward [1978] Law Society Library.

⁸ Barlow v Nicholson [1981-3] Manx L.R. 423.

deterrent element so that all those who are tempted to succumb to the taking of drugs, or to being involved in promoting the pernicious habit, should know that in the Isle of Man the likely inevitable consequence in the ordinary case will be the loss of their liberty".

This policy was stated much less emphatically in 1985, where Hytner J.A., an English Q.C. delivering the judgment of the Staff of Government, cast some doubt on whether there was a distinctively Manx sentencing policy, but indicated that if the policy was different, it was harsher than in England ¹.

A later case confirms a distinctively Manx sentencing policy. The case itself concerned possession of amphetamines rather than cannabis, but Deemster Corrin took the opportunity to review the policy of the Manx courts, and the perceived impact of that policy. He confirmed the dicta of Deemster Luft quoted above, and went on:

"It must be one of the best known facts in the Isle of Man that any person caught in possession of drugs, however small the amount, even for personal use, will usually suffer a short custodial sentence of imprisonment." ².

Thus, the Isle of Man has followed a policy of imprisonment for simple possession of soft drugs, even in small amounts, since before 1977. As Deemster Corrin implied, this policy has been made known in the Isle of Man, and efforts are made to bring it to the attention of visitors from England by, for instance, placing signs describing the policy at the main ports of entry. How far has this policy affected drug abuse in the Island?

The annual reports of the Chief Constable of *Meoiryn-Shee Ellan Vannin* (the Isle of Man Constabulary) indicate a worsening drug problem on the Isle of Man, although given the subject matter, and the size of the Island, statistics alone are not definitive. Detective Chief Inspector Kneale, of the Manx C.I.D. believes that "apart from the argument supported by statistics, intelligence and experience is showing that drug abuse is escalating at an alarming rate without any indication of a reversal of that trend" ³. Most interestingly, he cannot see any significant difference between drug abuse in the Isle of Man and nearby areas of England which are not subject to the special sentencing policy:

"The pattern of drug abuse and in particular the preferred drugs of abuse tends to follow that being experienced at the time in the North West of England, generally with a time lapse factor of a few months".⁴

This has been recognised by a recent judgement of the Staff of Government, delivered by Hytner J.A.. In *T v R* ⁵ the defendant was sentenced to youth custody for a number of drug

¹ Furness [1985] Law Society Library.

² *Buchanan v Oake* [1990-2] Manx L.R. 324

³ In a letter to the author.

⁴ *op.cit.*

⁵ *T v R* [1995] 24 Manx LB 47.

offences, the most serious being possession of a Class A drug with intent to supply, for which he received a three year sentence. On appeal against sentence it was argued that the Deemster had erred in applying sentencing guidelines from the English Court of Appeal because, *inter alia*, of a general constitutional principle, or a differing social climate. On the constitutional point, Hytner J.A. blurs several important issues in order to reach the conclusion that no constitutional principle prevents adoption of English guidelines. Firstly, the distinction between *stare decisis* as to the development of legal rules, and the slightly different, more individualised, function of sentencing. Secondly, the distinction between Judicial Committee opinions on areas of law common to the Manx and appellate jurisdictions, and all other elements of their opinions. Thirdly, the distinction between persuasive legal authority which may be consulted, and stronger authorities which must be followed. Fourthly, the distinction between legal rules, and the extra-legal influences upon those rules such as academic research and philosophy.

Nonetheless, his conclusion, read narrowly, seems sound. There is no constitutional reason why a Manx court, when composing sentencing guidelines, or justifying a sentence in a particular case, should not expressly adopt the wording of an English case, or Scots case, or even learned writing. Indeed there may be possible advantages, such as certainty and public awareness, for the courts to do so. It may even be appropriate, as Hytner J.A. seems to do, to assume that English guidelines should be the Manx default in the absence of good reason for adopting other guidelines. What does not seem justifiable is to erode the authority of the Manx courts to adopt their own sentencing policy within the law.

Hytner J.A. then moved on to suggest that no significant differences between Manx and English affairs justified a general departure from English guidelines, except insofar as deterrent sentences may be regarded as more effective in a small community, and the border security of the Island makes importation of drugs such as cannabis much easier than importation into the United Kingdom, thus justifying a harsher sentence. On the latter basis, and *obiter dicta*, Hytner J.A. concluded that those who brought even a small quantity of cannabis intended for their own use into the Island could expect an immediate, if short, custodial sentence.

The approach in *T v R* may usefully be contrasted with that in the earlier case of *Qualtrough v R*¹, a case concerning the appropriate sentence in rape, where Hytner J.A. noted that the Staff of Government had laid down sentencing guidelines in relation to rape which were identical to the then English guidelines, that the English guidelines had since changed for social reasons, and that the Court saw no social differences in the Island. It is submitted that the earlier, more sensitive, approach of Hytner J.A. is to be preferred.

Prostitution Offences.

After 1872 a number of statutory provisions, based on English statutes, prohibited a number of activities related to prostitution². The law closely followed the English model, with one exception. After 1967 "immoral purposes", in a section otherwise identical to an English statute, was defined to include expressly unlawful sexual intercourse³.

¹ *Qualtrough v R* [1988] Manx L.R. 244.

² Criminal Code Amendment Act 1886 s.18 [o]; Sexual Offences Act 1967 s.31(1) [1956/69/32]; Criminal Code Amendment Act 1886 s.18(2) [o]; Sexual Offences Act 1967 s.32 [1959/57/1]; Vagrancy Act 1896 s.2 [1824/83/4]; Vagrancy Act 1906 [1898/39/1]; Code 1872 s.346 [1752/36/8]; Criminal Code Amendment Act 1886 s.4,8,19 [1885/3,6,13]; Children Act 1910 s.19,20 [1908/67/16,17]; Mental Diseases Act 1924 s.73 [1913/28/56]; Children and Young Persons Act 1966 s.2-3 [1933/12/2-3]; Sexual Offences Act 1967 s.21,24-30,33-36 [1956/69/22,25-30,33-36]; Vagrancy Act 1906 s.2(a) [1898/39/1(1)(a)]; Ainsworth [1990-2] Manx L.R. 104; COLUMNIST, "Proceeds of Immoral Earnings", [1966] Isle of Man Courier 28 October; Sexual Offences Act 1992 s.17-31 [1956/69/22-3,9,24-36,1959/57/1].

³ Sexual Offences Act 1967 s.31(2).

Chapter Eighteen: Participation in a Criminal Offence.

Having discussed the criminal offences known to Manx law, it is useful to consider involvement in criminal offences other than by the principle, and the inchoate offences.

Participation Before the Fact.

By customary law aiding commission of a felony was itself felony ¹. This aid could occur before the felony was committed ² or, more usually, during commission ³. There is no evidence that participation in a misdemeanour before the fact was treated as a separate offence. It is likely that the distinction between principal and accessory was less important for these offences ⁴. Customary law was in line with the English law in this area ⁵.

The Code of 1817 briefly placed the Manx law on participation before the fact upon a separate track from English law. It was provided that an accessory before the fact to a capital felony was also guilty of a capital felony ⁶, while an accessory before the fact to any other felony was guilty of misdemeanour ⁷. The later Code adopted English statute law, and provided that being an accessory before the fact to a felony, misdemeanour or summary offence was an offence of the like nature ⁸.

Participation After the Fact.

Criminal liability also followed where a person, previously uninvolved in an offence, became involved after it had been committed by "assist[ing] the criminal after his crime, with a view to shielding him from justice" ⁹. In early Manx customary law, knowingly to entertain a felon

¹See M'Cowle [1517] Q.P.; Wife's Case [1520] Q.P..

²Teare [1560] Q.P..

³Heywood [1650] L.P.; Kneal [1672] L.P.; Corkill [1717] L.P.; Hewelston [1725] L.P..

⁴See the later cases of Clucas and Jones [1829] Manx Sun 29 September; Boscow v Christian [1831] Manx Sun 4 October.

⁵STEPHEN J.F., *op.cit.*, (1883) ii.221-240.

⁶Code 1817 s.60 [o].

⁷Code 1817 s.61 [o].

⁸Code 1872 s.350,351,356,237 (curiously repeated in almost identical terms by s.413) [1861/94/1,2,8; 1861/96/99;o].

⁹*ibid.*, ii. 231.

¹, as in English common law, was itself felony. Additionally, there is evidence that reception of a petit thief ² was felony ³. By 1744, in contrast to English law ⁴, the offence had fallen to mere misdemeanour ⁵. The Code of 1817 also placed the misdemeanour of participation after the fact upon a statutory basis ⁶, and the later Code increased the offence to felony by adopting an English statute ⁷.

Compounding.

As well as this general offence, there existed the misdemeanour of compounding. At early customary law compounding was the refusal to prosecute, or deliberate mishandling of a prosecution, so that a felon escaped justice. Such composition was misdemeanour ⁸, whether committed by an officer ⁹ or a private individual ¹⁰, although there is one instance, indistinguishable from other cases, where such composition was adjudged felony ¹¹. Generally, composition of a misdemeanour was not an offence. Two exceptions to this can be explained as special cases, rather than objections to the general principle ¹². The Manx customary law appears to have defined composition more widely than the English offence, which punished an agreement not to prosecute a felon as misdemeanour. In 1737 the statutory

¹Felon's Case [1498] Q.P.; Felon's Case [1556] Q.P.; see Customary Laws 1417; Customary Laws 1577 s.33; cf. Concealor of Felony [1566] Q.P.. Assistance of an arrested felon was also prohibited - Receptor's Case [1498] Q.P..

²That is, one who committed theft below the value of felony, itself mere misdemeanour.

³Customary Laws 1577 s.33. The section was concerned more with removing any distinction between Northside and Southside, but seems clear enough on this point also.

⁴cf. COKE III, (1644) Ch.3 which describes this offence as misdemeanour.

⁵Christian [1744] L.S.; see also Christian [1720] L.S..

⁶Code 1817 s.60,61 [o].

⁷Code 1872 s.352 [1861/94/3].

⁸PARR, 32.08.

⁹See also Cubbon [1691] L.P.; Moar's Case [1533] Q.P.; Customary Laws 1422 s.57; Felon's Case [1695] L.S..

¹⁰Burglary Case [1577] Q.P.; Holly [1629] L.S.; Combination Case [1674] L.S.; cf. Horsethiefs Case [1527] Q.P..

¹¹Horsethief's Case [1527] Q.P..

¹²Moar's Case [1497] Q.P.; Casement [1645] L.P. See also PARR, 19.02; M'Huggin [1418] Q.P.; Hick [1497] Q.P.; Caiskill [1621] L.P.; Moar's Case [1589] L.P.; Cowley [1651] L.S.; Quilliam [1658] L.P.; Foresters Case [1659] L.P.; Curphey [1659] L.P.; Kaighan [1660] L.P.; Quayle [1664] L.S.; Curphey [1667] L.P.M.R.; Huddleston [1668] L.S.; Servant Jury [1669] L.S.; Cunningham v Shimmin [1816] L.S.; Customary Laws 1422 s.45; Archdeacon's Case [1513] Q.P.; Kelly [1774] L.S.; Crow [1582] L.S.; Parker [1711] L.S.; Siblings Case [1567] Q.P..

misdemeanour of agreeing not to proceed in a criminal prosecution after stolen goods had been found was created ¹. This offence could extend to composition of the misdemeanour of petty larceny, and appears to have been based on the English offence of "theft bote" ². The first Code defined the misdemeanour of compounding as the compounding of any treason, felony or misdemeanour, or the taking of goods or money from a person accused to forbear from prosecution ³. The later Code described the misdemeanour in more detail, and extended it to some withholding of evidence ⁴. In 1981 English statutory models were adopted for compounding ⁵.

A related area of Manx law might usefully be discussed here. By customary law, a husband who was an accessory to a felonious wife suffered the usual punishment ⁶. A wife who was an accessory to her husband was not liable to punishment however, since she was considered "but subject and obedient to the Man" ⁷. This rule can be traced to a ninth century Scots statute ⁸, but also appears related to the early English customary rule which created a presumption of assistance for husbands, but not for wives ⁹. The rule concerning involvement by a wife fell into disuse, and was replaced by the rule of marital coercion, adapted from the English law ¹⁰.

Inchoate Offences.

This section is concerned only with offences of general application - thus, those statutory provisions which prohibited attempted offences, as well as the completed offence itself, are not detailed.

The law of attempt followed that of England in general outline. By customary law an attempt to commit a felony ¹¹ or a misdemeanour ¹² was in itself a misdemeanour ¹³. Prosecution for attempt under customary law was rare however, and the tendency in early statutes to expressly

¹Criminal Law Act 1736 s.(4).

²STEPHEN J.F., *op.cit.*, (1883) i.502.

³Code 1817 s.34 [o].

⁴Code 1872 s.317 [o].

⁵Criminal Law Act 1981 s.7(1),8(1),8(4) [1967/58/4(1),5(1),5(4)].

⁶Customary Law 1504 s.54; see Waterson [1665] L.S. for an example of this.

⁷Customary Laws 1504 s.4.

⁸Statute of Kenneth, 834.

⁹See BRACON H. de, *op.cit.*, 425-429.

¹⁰Kinnish et al [1887] Law Society Library.

¹¹Wood v Fitzsimon [1807] L.S.; Kelly [1754] L.S. (a weak authority).

¹²COKE III, (1644) Ch.98.

¹³cp. STEPHEN J.F., *op.cit.*, (1883) ii.224.

prohibit attempted offences may indicate that the scope of the criminal law was unclear. The Code of 1872 provided that any attempt to commit a felony or misdemeanour, not otherwise provided for, was a misdemeanour ¹. In 1981 an alternative approach was taken, one of interpretation rather than substance:

"a provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against that provision, punishable as if the offence itself had been committed" ².

Surprisingly, there is no precedent indicating the existence of an offence of conspiracy at customary law, not even so narrow an offence as that found in early English common law ³. On one occasion three witnesses testified that a man had died of a fit, but failed to mention that he appeared to have taken wild hemlock, inadvertently, before he died. The Attorney General reported that, while they had not acted from bad intent, they merited some punishment. On the evidence he believed that a perjury prosecution would fail. He went on "[I]n England they could be prosecuted for conspiracy, an offence which is not provided for in our Criminal Code" ⁴. Given that customary felonies could still be prosecuted at this time, it appears that, if conspiracy was an offence at all, it was misdemeanour. If it had been felony then the Attorney General could have advised prosecution of the same. The Code of 1872 created felonies relating to unlawful oaths based on English statutes ⁵, and, for the first time, a misdemeanour of conspiracy. The latter was based very closely on the common law in England ⁶.

Finally, turning to incitement customary law in this area may have recognised a distinction between incitement of children and of adults. In both cases incitement to commit a misdemeanour was itself a misdemeanour ⁷, but inciting children to felony was mere misdemeanour ⁸ while inciting adults to the same was felony ⁹. Insofar as incitement to

¹Code 1872 s.336 [o].

²Criminal Law Act 1981 s.9,10 [o]; see Dillon [1983] Law Society Library.

³COKE III, (1644) Ch.66.

⁴Attorney General Gell to Lieutenant-Governor Loch, 3 June 1869 [Letterbooks 15,429].

⁵Code 1872 s.315,316 [1812/104/1,1].

⁶Code 1872 s.330; see Anderson [1964] Law Society Library; Constantinous [1987-1989] Manx L.R. 312.

⁷Comish [1675] L.S. - a difficult case best viewed in the light of Cowne [1666] L.S.; High Baliff v Kermeen [1800].

⁸Children's Case [1569] Q.P..

⁹Kinread [1823] L.P.; Compounding Case [1695] L.S.; Doran [1796] L.S. cf. the exceptional case of Christian [1702] L.S. where incitement to commit felony was punished as misdemeanour - the actual felony itself was punished as a misdemeanour in the same case, so it cannot be taken as outlining a general principle.

commit felony constituted felony, the law of the Island was harsher than that of England ¹. The Code of 1817 did not deal with incitement, but the later Code provided, on the English model, that anyone who solicited or endeavoured to procure any other to commit a felony or misdemeanour, such solicitation not being otherwise provided for, was guilty of misdemeanour ².

¹See STEPHEN J.F., op.cit., (1883) ii.221-240.

²Code 1872 s.336 [o]; see also s.237 [1861/96/99] on summary offences.

Chapter Nineteen: Punishments for Criminal Offences.

This section discusses the general punishments for criminal offences in Manx law. No attempt is made to detail the maximum and minimum punishment for particular offences, or the accepted levels of tariff which have developed in modern case-law. It is worth noting in relation to the latter, however, that the Manx courts generally follow English tariffs and guidelines in sentencing for offences extant in both jurisdictions.

Fines and Forfeiture.

The fine was always an important sanction in Manx law, as in English ¹. The exact details, while differing from English law, need not be noted here ². After 1864 the purely punitive fine could be accompanied, in some circumstances, by an award of compensation ³.

Additionally, a convict could be required to forfeit property. Before Revestment, forfeiture was an important part of the Lord's revenue - indicted felons who died before arraignment were liable to forfeiture ⁴, and there are instances of the decision to spare a felon arraignment being based upon the felons lack of property ⁵. The Code of 1817 provided for forfeiture of all lands, tenements, goods and chattels for capital offences ⁶, but did not apply forfeiture to the newly created non-capital felonies. The Code of 1872 was entirely silent on forfeiture, but it could be argued that forfeiture only survived for capital offences ⁷. In the words of a Home Office official, however,:

¹See, for instance, *M'Cray v Bullock* [1417] Q.P.; Larcenies and Other Offences Act 1629 s.3 [o].

²See *Ireland v Lace* [1632] L.C.; Customary Laws 1504 s.16; PARR, 1.05-.06, 32.05, 50.13-.23; see Attorney General's Opinion 14 February 1874 [H.O.45/9343/23542].

³See Summary Jurisdiction Act 1864 s.18 [1851/92/21]; Petty Sessions and Summary Jurisdiction Act 1868 s.20 [1861/96/108]; Code 1872 s.238 [1861/96/100]; Petty Sessions Act 1900 s.19 [1879/49/16]; Criminal Justice Act 1963 s.22 [o]; Criminal Law Act 1981 s.21 [o]. In special cases, such as bloodwipe, customary law also recognised the restitution of the victim as part of the criminal process.

⁴With or without trial - see *Dead Felon's Case* [1519] Q.P.; *Dead Felon's Case* [1587] L.P..

⁵*Read* [1669] L.S..

⁶Code 1817 s.57 [o].

⁷See Lieutenant-Governor to Home Office, 7 June 1873; Lieutenant-Governor to Home Office, 13 June 1873; Lieutenant-Governor to Home Office, 17 July 1873; Home Office to Lieutenant-Governor, 3 September 1873; Lieutenant-Governor to Home Office, 21 October 1873; Law Officers to Home Office, 17 December 1873; Opinion of Counsel 18 March 1874; Attorney-General to Home Office, 4 February 1874; Attorney-General to Home Office, 18 March 1874; Attorney General to Home Office, 14 February 1874 [P.R.O. - H.O. 45/9343/23542].

"to insist on this forfeiture in the Isle of Man after it has been abolished by Act of Parliament in England [would] be a public scandal" ¹

and thus general forfeiture declined in the Isle of Man after the abolition of the procedure in England ². More specific forms of forfeiture, based on English models, were created by statute ³.

Corporal Punishment.

Corporal punishment was formerly a very common punishment for misdemeanour ⁴. Such punishment could include pillorying ⁵, placing in the stocks ⁶, being made to run the gauntlet ⁷, wearing of an iron collar for a specified number of years ⁸, removal of both ears ⁹ or a hand ¹⁰, or burning of the hand with a hot iron ¹¹. While all of these penalties were to be found in English law, the case where removal of the hand was recognised as the proper punishment is

¹Home Office to Lieutenant-Governor, 3 September 1873 [P.R.O. - H.O. 45/9343/23542].

²See Lieutenant-Governor Loch to Attorney General Gell, 4 July 1878 [Letterbooks 34,515]; Attorney General Gell to Lieutenant-Governor Loch, 4 July 1878 [Letterbooks 34,520]; Lieutenant-Governor Loch to Under-Secretary of State, 11 December 1878 [Letterbooks 35,107]; Liddell to Lieutenant-Governor Loch, 10 January 1879 [Letterbooks 35,133]; Lieutenant-Governor Walpole to Under-Secretary of State, 2 December 1891 [Letterbooks 1891-3, 112]; Lieutenant-Governor Walpole to Attorney General, 28 November 1891 [Semi-Official Letterbook 1891-3, 166]; Lieutenant-Governor Haniker-Major to Under-Secretary of State, 18 November 1895 [Letterbooks 1894-6, 419]. See also P.R.O. - H.O. 45/246/A54449.

³See Criminal Law Act 1981 s.16 [1973/62/43]; Drug Trafficking Offences Act 1987 s.1-29; Criminal Justice Act 1990 s.1-23.

⁴See COLUMNIST, "Birching - the facts", [1972] Isle of Man Courier 17 March; "Birching could be halted", [1974] Isle of Man Courier 26 July; "Put it to the Parishes Call", [1975] Isle of Man Courier 28 April; "Birching uproar", [1969] Isle of Man Examiner 27 November; "Stop poking your noses into Manx affairs !", [1970] Mona's Herald 1 September; "Birch Petition is withdrawn", [1976] Isle of Man Examiner 27 February; "Will Woman Magistrate resign from bench? - Birching enquiry call to Lieutenant-Governor", [1970] Isle of Man Times 15 February; "Birch and Gaol for Armed Robbery", [1973] Isle of Man Times 15 February; "European Commission may take up birch question", [1972] Isle of Man Times 28 September; "Birch sentence sensation", [1981] Isle of Man Times 21 July; "Birching for legal scrapheap?", [1992] Isle of Man Examiner 30 June.

⁵Perjury Case [1685] L.S.; Quirk [1687] L.S.; Norris [1657] L.S..

⁶Moor [1668] L.S..

⁷Marshall [1722] L.S..

⁸Weaver's Case [1577] Q.P..

⁹Defamation Act 1601 [o]; Quark [1728] L.S.; Curphey [1671] L.S..

¹⁰Stanley [1650] L.S..

¹¹Criminal Law Act 1736 s.(2) [o]; Kirkheim & Kennesie [1818] L.P..

particularly interesting, as it was based on an English statute then in force, rather than any Manx precedent ¹. The predominant form of corporal punishment, however, was whipping ².

Of the pre-Revestment corporal punishments, only whipping ³ survived the codification of Manx criminal law. The details of the punishment were regulated by statute ⁴. In the wake of the decision of the European Court on Human Rights in *Tyrer v United Kingdom*, which found the Manx punishment to be contrary to the Convention, this punishment ceased to be imposed in the Isle of Man ⁵. It was not until 1993 the the penalty was formally abolished ⁶.

Exile.

By customary law exile, or abjuration of the Isle, might be offered to a condemned felon as an alternative to execution ⁷. This sanction was better developed in the Island than in England, where it was usually applied only to those in sanctuary ⁸. The abjured person was required to leave the Island within a specified time ⁹ and, if they returned without pardon, forfeited life and limb ¹⁰. Although generally for life, this exile could be served in any place, and no forced labour was implied ¹¹. The punishment of exile appears to have followed the same pattern as English common law ¹². By 1674 the English innovation of exile plus mandatory labour in a set place had begun to influence Manx law ¹³. For nearly a century this combination of abjuration and transportation co-existed with the older form of abjuration ¹⁴, but from 1741

¹See p.199.

²eg. Larcenies and Other Offences Act 1629 s.3 [o]; Martin [1642] L.P.; Boy's Case [1568] Q.P.; Paupers Case [1675] L.S.; Woman's Case [1686] L.S..

³eg. Larcenies and Other Offences Act 1629 s.3 [o]; Martin [1642] L.P.; Boy's Case [1568] Q.P.; Paupers Case [1675] L.S.; Woman's Case [1686] L.S..

⁴Code 1872 s.409 [o]; for more detailed provisions see Summary Jurisdiction Act 1960 s.10, 15 [o]; Criminal Justice Act 1963 s.14, 20 [o].

⁵See p.99.

⁶Criminal Justice (Penalties etc.) Act 1993 sch.2.

⁷cf. Vagabonds Abjuration [1505] Q.P.; Caine [1735] L.P..

⁸STEPHEN J.F., op.cit., (1883) i.480. Exile could also follow as a result of sanctuary in the Isle of Man, along lines broadly similar to those adopted in England - see BRACTON H. de, op.cit., 382-4.

⁹Being moved on by the Coroner of each Sheading - see Coroner of Rushen [1583] L.S..

¹⁰Inecroborough [1520] Q.P.; Read and Quayle [1580] L.P.; Kelly [1626] L.P.; Crowe [1659] L.P.; Customary Law 1422 s.2.

¹¹cf. Caine [1735] L.P..

¹²See BRACTON H. de, op.cit., 382-4.

¹³Corrin [1674] L.P.; Christian [1691] L.P.; Kissag [1692] L.P..

¹⁴See Faile [1701] L.P.; Taggart [1717] L.P.; Caine [1735] L.P.; Kelly [1741] L.P..

the older form fell into disuse ¹, except where offered to indicted felons before trial ², or to defendants before indictment ³, which survived well into the nineteenth century.

The Code of 1817 placed exile, or rather transportation, on a statutory basis ⁴. After a difficult period, during which Manx law allowed the punishment but English law did not ⁵, the later Code replaced transportation with the more flexible punishment of penal servitude ⁶. Both punishments were abolished in 1963, by provisions based on an English model ⁷. Even in 1992, however, a form of exile was possible. In *Daly* ⁸, for instance, a defendant normally resident in the United Kingdom was given a two year conditional discharge - part of the condition being that he leave the Island as soon as possible and not return for at least two years.

Imprisonment.

Imprisonment was a relatively unimportant punishment during the currency of capital punishment, corporal punishment, and exile. Forced labour, as a punishment in itself, occurred only as a rare condition to a reprieve by the Sovereign ⁹.

With the demise of many traditional modes of punishment, imprisonment increased in importance ¹⁰. Sentence was generally served in a duly authorised Manx prison ¹¹. This was

¹cf. CRAINE D. *Mannannan's Island* [Douglas] (1955), 36-48 which puts the date at 1797.

²See Miller [1818] *Weekly Gazette* 10 September.

³See Cain [1830] *Manx Sun* 26 February - this was an informal process.

⁴Code 1817 s.55 [o]. See 4 Geo.1 c.11; Hobhouse to Lieutenant-Governor, 16 May 1816 [P.R.O. - H.O. 48/17].

⁵See Attorney General to Home Office, 14 December 1863; Lieutenant-Governor to Home Office, 22 December 1863 [P.R.O. - H.O. 45/O.S. 7437]; Bruce to Lieutenant-Governor Loch, 19 November 1869 [Letterbooks 16,77]; Lieutenant-Governor Loch to Bruce, 26 November 1869 [Letterbooks 16,95].

⁶Code 1872 s.369,399 [o].

⁷Criminal Justice Act 1963 s.1 [1948/58/1].

⁸Daly [1991] Law Society Library.

⁹See Caine [1735] L.P.; Fayle et al [1702] L.P.; Servant's Case [1609] L.S.; see also Weaver's Case [1577] Q.P..

¹⁰See Prison Act 1911 s.4; Criminal Justice Act 1963 s.21 [1962/15/17(2)]; restated in Criminal Justice (Computation of Sentences) Act 1975 s.1 [1967/80/67]; cf. customary law in Morrison [1841] L.P.; Prison Act 1965 s.18,19 [1952/52/24,25]; Custody Act 1995; Capital Punishment Act 1852 [1827/28/9]; Petty Sessions Act 1864 s.12(2) [1851/93/21(2)]; Code 1872 s.397,408,409 [o]; Thompson [1840] L.P.; Crow [1842] L.P.; 54&55 Vict. c.69 s.1; Criminal Justice Act 1963 s.1 [1948/58/1]; Criminal Justice Act 1963 s.1 [1948/58/1].

¹¹Code 1872 s.422 [o]; Prison Act 1890 [1865/126]; Prison Act 1965 [1952/52; 1961/39]; Custody Act 1965.

not always ideal, however, since the Manx "prison population [was] so small that it [was] impossible ... to provide separate treatment for separate types of prisoners" ¹. From 1892 young offenders could be transferred to specialist institutions in the United Kingdom ², but after 1986 custody in a detention centre was in the Isle of Man - causing practical difficulties when the Isle of Man lacked such a centre ³. Similar treatment of adults requires more discussion. In 1911 a Manx statute provided for the transfer of convicted persons to English prisons ⁴, but the Imperial Bill intended to implement the transfer encountered problems during debate. In order to ease its passing, the clause relating to the Island was deleted ⁵, and so persons transferred to England could not lawfully be detained ⁶. It was not until 1925 that the empowering Imperial legislation was enacted ⁷. After 1965 authorisation of such a transfer came from the United Kingdom Secretary of State under a process established by Imperial Statute ⁸ but given power in the Island through an Act of Tynwald ⁹. Such prisoners were, once transferred, treated exactly as if they had been sentenced by a United Kingdom court. In 1985 this empowering statute was repealed ¹⁰, and the practice ceased. As would be expected in an area with so much structural linkage, a number of Imperial Acts addressed imprisonment ¹¹.

Capital Punishment.

By customary law the mandatory sentence for treason or felony was death ¹². This contrasted sharply with English law, which between 1275 ¹³ and 1827 ¹ was dominated by the doctrine

¹Home Office to Lieutenant-Governor, 30 March 1931 [P.R.O. - H.O. 45/17337/202173].

²Criminal Code Amendment Act 1892 s.21-4 [o;o;1886/47/14;o]; Criminal Law Act 1981 s.13 [o]; 1967 c.80 s.69(1); 1 Edw.8 & 1 Geo.6 c.37 s.87; 15&16 Geo.6 & 1 Eliz.2 c.52 s.45;; 1961 c.39 s.13; 1969 c.54 s.26.

³S v Oake [1991] 16 Manx L.B. 56; S v Oake [1992] 18 Manx L.B. 78. See Criminal Justice Act 1993 sch.1.

⁴Criminal Code Amendment Act 1911 s.2-5 [o]; repealed by Prison Act 1965 s.37.

⁵Lieutenant-Governor to Home Office, 22 July 1926 [P.R.O. - H.O. 45/17337/202173].

⁶Home Office to Lieutenant-Governor, 13 August 1926 [P.R.O. - H.O. 45/17337/202173].

⁷15&16 Geo.5 c.86; 15&16 Geo.6 & 1 Eliz.2 c.61 s.36. See 47&48 Vict. c.31, S.I. 1945/1275; S.I. 1937/230.

⁸1961 c.39 s.26,27.

⁹Prison Act 1965 s.32(1) [o]; see Thain [1984] Law Society Library; Furness [1985] Law Society Library.

¹⁰Criminal Law Amendment Act 1985 s.3(2).

¹¹15&16 Geo.6 & 1 Eliz.2 c.52,61; 1963 c.37 s.53; 1961 c.39 s.20,24,28,30,32-33,Sch.1+2.

¹²COLUMNIST, "Peeps into the Past", [1963] Isle of Man Courier 5 April; "Peeps into the Past", [1967] Isle of Man Courier 30 June; "Are the days of hanging over?", [1968] Isle of Man Times 26 February; "The Day Calcraft arrived to carry out an execution", [1981] Isle of Man Courier 20 February; "Report of the execution", [1823] Mona's Herald, 22 April.

¹³3 Edw.1 c.2.

of benefit of clergy. This doctrine allowed many felons to escape execution as of right ² but never existed in Manx law ³. Traitors of both sexes were hung, drawn and quartered, the English rule whereby female traitors were burnt ⁴ never having been part of Manx law. On the other hand, felons were treated differently according to their sex. Male felons were hung ⁵, as in England ⁶, but female felons were sewn into a sack and hurled into the sea in order to drown them ⁷. This distinction did not exist in English law and, while similar to the Roman punishment for patricide ⁸, is probably derived from Scots law. By the middle of the seventeenth century drowning, although recognised as customary, had been neglected in favour of hanging ⁹. Men and women convicted of witchcraft were burnt ¹⁰.

The period after Revestment also saw the decline of execution as a punishment. The Code of 1817 set the penalty on a statutory basis, distinguishing between hanging, decapitation and disposal at the will of the Sovereign for treason ¹¹; hanging and disposal at the will of the Sovereign for murder ¹²; and hanging for other capital felonies ¹³. This distinction between murder and other capital felonies, introduced to render the punishment for murder especially severe, echoed the English statutes on gibbeting and dissection ¹⁴. In 1872 these forms were

¹7&8 Geo.4 c.28.

²STEPHEN J.F., *op.cit.*, (1883) iii.457-492.

³Criminal Law Act 1736 s.(2) refers to burning of the hand - at one time a consequence of claiming benefit of clergy under English law - but no other evidence supports the doctrine, and a wealth of evidence indicates it did not exist.

⁴See STEPHEN J.F., *op.cit.*, (1883) i.476.

⁵According to the ancient custom a hair rope was used - see Governor Lindesay to Lord Athol, 22 February 1747 [M.M.A.].

⁶At the start of the period there were some beheadings - see Note [1519] Q.P..

⁷Wife's Case [1520] Q.P..

⁸See STEPHEN J.F., *op.cit.*, (1883) i.476.

⁹CHALONER J., *A Short Account of the Isle of Man*, (1656) *Manx Society* 10,1 at 37.

¹⁰Inequane and Cubbon [1617] L.P.; Inequane [1569] Q.P.; see CRAINE D., *op.cit.*, (1955) 13-30 for the punishment in the Viking era.

¹¹Code 1817 s.52 [o].

¹²Code 1817 s.53 [o]. In 1823 Comaish and Kinrade were ordered to suffer execution and then to "be anatomised and afterwards interred without the rules of Christian burial" - Letter to Governor Atholl and Lieutenant-Governor Smelt from the Home Office, 12 April 1823 [Manx Museum]. It appears from the report of Siddleton and Moore [1832] *Manx Sun* 2 October, *Manx Sun* 23 October that the letter of the law was not always insisted upon. In that case the pair were "delivered to the friends of the deceased for internment".

¹³Code 1817 s.54 [o].

¹⁴See 25 Geo.2 c.37; 2&3 Will.4 c.7 s.16; abolished by 4&5 Will.4 c.26 s.2.

unified into death by hanging, the body then to be buried according to the order of the Court ¹. There was a gradual reduction in the number of capital offences but, unlike the United Kingdom, death remained the mandatory sentence for murder until 1992 ². In that year, all death penalties within the jurisdiction were replaced with life imprisonment ³.

Non-Custodial Sentences.

As well as these developments of established punishments, the period after Revestment has seen the development of entirely new, statutory, modes of punishment. Conditional and unconditional discharges were available as a sentence after 1868 ⁴. Between 1872 and 1981 a twice-convicted felon could become, under a statute based on an English model, subject to police surveillance ⁵. After 1913, probation became available ⁶. After 1981 the courts were empowered to sentence offenders to perform periods of community service ⁷.

Capital Punishment In The Isle Of Man After 1973.

One particularly interesting feature of punishment in the Isle of Man is the practice of capital punishment, or rather the practice of sentencing to capital punishment, after 1973. It is possible to identify every defendant tried for a capital offence in the Isle of Man after 1973, and detail the results of their trial.

Table 3: Defendants Tried with Capital Offences in Manx Courts 1973-1993. ⁸

Name.	Date	Details.
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¹Code 1872 s.368 [o].

²Code 1872 s.18 [o].

³Death Penalty Abolition Act 1993 s.1 [o].

⁴Summary Jurisdiction Act 1864 s.18 [o]; Petty Sessions and Summary Jurisdiction Act 1868 s.20 [1861/96/108]; Code 1872 s.402,417 [o;o]; Criminal Code Amendment Act 1892 s.4 [1891/69/1(2)]; Petty Sessions Act 1900 s.10,19 [1879/49/25,16]; Petty Sessions and Summary Jurisdiction Act 1927 s.79 [1879/49/25]; Criminal Justice Act 1963 s.6,7 [1948/58/7,8].

⁵Code 1872 s.420 [1869/99/8].

⁶Probation Act 1913 s.3-8 [1907/17/1-2]; Criminal Justice Act 1963 s.2-5,7,30,31 [1948/58/3-6 ,8;o;o] (s.30-31 amended by Summary Jurisdiction Act 1988 s.3). See Childrens Act 1936 s.25, Custody Act 1965 sch.1.

⁷Criminal Law Act 1981 s.14,Sch.3 [1973/62/14-17]. See also Criminal Justice (Penalties etc) Act 1993 s.7.

⁸Many thanks to the Chief Registrar of the Isle of Man General Registry, P.N.A. Curtis, for the data contained in this table.

Lunney	1973	Convicted of murder. Death sentence commuted to life imprisonment.
Frankland	1980	Convicted of murder. Death sentence commuted to life imprisonment. Conviction reduced to manslaughter on appeal to the Privy Council.
Cooke	1981	Acquitted of murder, convicted of manslaughter.
Pate	1981	Convicted of murder and sentenced to death. Conviction reduced to manslaughter on appeal.
Sansom	1982	Acquitted.
Moore	1982	Convicted of murder and sentenced to death. Sentence commuted to life imprisonment.
Teare	1992	Convicted of murder and sentenced to death. Retrial ordered on appeal. Convicted of murder and sentenced to life imprisonment at new trial.

It is obvious that no defendant convicted of a capital crime after 1973 was actually executed. This, in itself, does not show that capital punishment was defunct. The royal prerogative might still have been being used to discriminate between levels of murder and murderer - perhaps none of the murderers merited execution during this period ¹. Other evidence, however, also suggests that the death penalty was a dead letter throughout this period. Manx

¹Little is to be gained by this author expressing an opinion that any of these murderers actually deserved death. Comparing the facts of these cases with the guidelines in Royal Commission on Capital Punishment 1949-1953, (Cmnd. 8932, 1953) at 39, and the theoretical models in KOBIL D.T., 'The Quality of Mercy Strained: Wrestling the Pardoning Power from the King', 69(3) Texas Law Review 69, 1991, 569 at 624 does, however, indicate that a pardon would not have been a foregone conclusion for all these murderers in an operating system of capital punishment.

newspapers, for instance, recognised that the penalty would not be carried out ¹, and there is some evidence that this was recognised well in advance by the convict ². Most telling, however, is the *dicta* of the Staff of Government in *Frankland* ³. Frankland had been convicted of murder, sentenced to death, and then had the conviction reduced to manslaughter by the Privy Council. He was sent back to the Staff of Government to receive a sentence for manslaughter. Hytner J.A. delivered the judgment of the Court, noting that “although you must have been told you were not going to be hanged, you did suffer the unpleasant and probably frightening experience of being sentenced to death”. Thus, even the Manx appellate court recognised, by 1980 ⁴ at the very latest, that no murderer would be executed ⁵.

By this point, then, a macabre dance had developed ⁶. A murderer would be convicted of a capital offence under a Manx statute, and inevitably be sentenced to death by the Deemster. The murderer would then apply to the British Home Office for commutation, which would inevitably be granted. All the actors in the drama recognised that he was under no danger of actually being executed. In the statute books, all murderers were executed. In practice, none were ⁷.

¹See (1963) *Mona's Herald* 16 July; (1968) *Manx Examiner* 25 January - 'Tynwald has decided to retain the death penalty in the Island - in spite of the fact the Home Secretary could never allow it to be carried out'; (1968) *Isle of Man Times* 26 February.

²See (1980) *Isle of Man Times* April 22.

³Frankland (1987) Unreported.

⁴This was the date of Frankland's original convictions.

⁵This point was also recognised in the debates of Tynwald on the Death Penalty Abolition Bill, so often indeed that individual citations are not given. See Second Reading, House of Keys, 3 November 1992 (*Manx Debates* 1992, K33); Consideration of Clauses, House of Keys, 10 November 1992 (*Manx Debates* 1992, K40); *Select Committee*, op.cit.; Third Reading, House of Keys, 26 January 1993 (*Manx Debates* 1993, K142); First Reading, Legislative Council, 2 February 1993 (*Manx Debates* 1993, C49); Second Reading, Legislative Council, 9 February 1993 (*Manx Debates* 1993, C69); Third Reading, Legislative Council, 23 February 1993 (*Manx Debates* 1993, C78).

⁶I am indebted to Mr. Lowey for this phrase, which he uses in Third Reading of the Death Penalty Abolition Bill, Legislative Council, 23 February 1993 (*Manx Debates* 1993, C80).

⁷It could be argued that this was not peculiarly Manx. See, for instance, L.P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, [Oxford] 1989, 29; *Royal Commission on Capital Punishment 1949-1953*, (Cmd. 8932, 1953) para. 37.

It is clear that the special ritual, whereby every convicted murderer was sentenced to death, but none would ever hang, was a product of the constitutional relationship between the Isle of Man and the United Kingdom.

After 1765 the British Crown inarguably possessed the power to grant a full or conditional pardon for any and all murderers so sentenced, for any reason whatsoever ¹. Equally, it seems clear that Tynwald had the power to require the death sentence for particular offences. The ritual was the product of constitutional and political decisions as to how the powers of these parties were to be exercised.

Britain effectively abolished capital punishment after a heated debate on the merits of the punishment ². It seems clear that after the abolition in Great Britain the Home Secretary

¹See on this C.H. Rolph, op.cit. at 2; C.A.H. Johnson, 'Entitled to Clemency: Mercy in the Criminal Law', 10 *Law and Philosophy*, 1991, 106 at 111; D.T. Kobil, op.cit., 578; P. Whitlock Cobb P, 'Reviving Mercy in the Structure of Capital Punishment', 99(1) *Yale Law Journal*, 1990, 389; *State v Alexander*, 76 N.C. 231 (1877). For an introduction to exercise of the pardon in England see P. King, 'Decision Makers and Decision Making in the English Criminal Law. 1750-1800', 27 *Historical Journal*, 1985, 25; D. Hay D., 'Property, Authority and the Common Law', in D. Hay, E.P. Thompson and P. Linebaugh, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, [London] 1975; J.M. Beattie, 'The Cabinet and the Management of Death at Tyburn after the Revolution of 1688-1689' in L. Shwoerer, *The Revolution of 1688-9: Changing Perspectives*, [Cambridge] 1991.

²Murder (Abolition of Death Penalty) Act 1965; 793 H of C Official Report (5th series) 16 December 1969 col. 1297; 306 HL Official Report (5th Series) 18 December 1969 col. 1321. For a flavour of the debate, see, L. Blom-Cooper (ed), *The Hanging Question*, [London] 1969; E.O. Tuttle, *The Crusade against Capital Punishment in Great Britain*, [London] 1961; *Royal Commission on Capital Punishment 1949-1953*, (Cmd. 8932, 1953). This paper does not aim to address that wider debate, on which see C. Kim & G.D. Garcia, 'Capital Punishment in the United States and Japan: Constitutionality, Justification and Methods of Infliction', 11(2) *Loyola of Los Angeles International and Comparative Law Journal*, 1989, 253; D. Rosenberg & K. Levy, 'Capital Punishment: Coming to Grips with the Dignity of Man', 14 *Californian Western Law Review*, 1978, 275; P.E. Mackey, 'The Inutility of Mandatory Capital Punishment: An Historical Note.', *Buffalo Law Review*, 1974, 30; H. Jones H. & N. Potter, 'Deterrence, Retribution, Denunciation and the Death Penalty', 49 *UMKC Law Review*, 1981, 158; S.C. Hicks, 'The Only Argument for Capital Punishment in Principle - A Frank Appraisal', 18 *American Journal of Criminal Law*, 1991, 333; L.S. Tao, 'Beyond Furman v Georgia: The Need for a Morally Based Decision on Capital Punishment', 71 *Notre Dam Lawyer*, 1976, 722; R.J. Gerber, 'A Death Penalty We Can Live With', 50 *Notre Dam Law Review*, 1974, 251 and especially N. Krishova, R. Copple, M. M'Donough, 'A Historical and Philosophical Look at the Death Penalty - Does it serve Society's Needs?', 16 *Creighton Law Review*, 1983, 1.

would have found it difficult to sanction, by refusing to commute, the execution of murderers barely twenty miles outside of Great Britain, within a dependency of the British Crown ¹. The Home Office have indicated that the merits of each case were not considered ². It was simply decided that Manx practice would conform with English law. The use of British constitutional power to gloss over the letter of Manx law would not be unique - perhaps the best other example is the *de facto* demise of felony forfeiture after its *de jure* abolition in England ³. Thus, the inevitable pardon is explicable as a function of the relationship of the Home Secretary to the British political scene.

The failure of Tynwald to amend its law to match reality can also be explained by constitutional considerations. During this period Tynwald, by constitutional convention, was left alone to legislate upon purely domestic matters such as criminal law. Thus, Tynwald was under little pressure from the British government to formally change the law. The legislators may have decided that capital punishment was worth retaining on the statute books to show the legislative competence of Tynwald ⁴; in case the British government underwent a change of heart and began to allow executions ⁵; because it was not worth the legislative time and

¹See, on this, Mr. Delaney, Consideration of Clauses of Death Sentence Abolition Act, House of Keys, 10 November 1992 (Manx Debates 1992, K49); Mr. Karran, Third Reading, House of Keys, 26 January 1993 (Manx Debates 1993, K145); Mr. Quine, *ibid*, K144. Although some of the issues are also raised in relation to the execution of British nationals abroad, and the retention of the death penalty in territories which still accept the authority of the Judicial Committee of the Privy Council, it is submitted that the constitutional position of the Isle of Man, and the legal authority vested in the Home Secretary as a result of that position, placed quite different pressures upon the British government in the case under discussion.

²My thanks to C3 Division of the Criminal Policy Department of the Home Office, who confirmed this view to me on the 6th of July 1994.

³See P.R.O. - H.O. 45/9343/23542, especially the letter of the Home Office to the Lieutenant-Governor, 3 September 1873; P.R.O. - H.O. 45/246/A54449. Consider also the contemporaneous events described in P.W. Edge, 'Dancing to the Beat of Europe', 144 *New Law Journal*, 1994, 770.

⁴*cf.* Mr. Delaney, Consideration of Clauses of Death Penalty Abolition Bill, House of Keys, 10 November 1992 (Manx Debates 1992, K49).

⁵Consider Mr. Gilbey, Second Reading, House of Keys, 3 November 1992 (Manx Debates 1992, K35).

effort to amend ¹; or because Tynwald did not wish to appear to have become more lenient to murderers ².

In 1992, following a murder conviction, which was later quashed on appeal, a Bill entered Tynwald to replace the death penalty with a mandatory life sentence. The principal driving force behind the Bill was a recognition that the sentence was being passed with no possibility of execution, and a desire to bring the law into line with actual practice ³. In 1993, the death sentence for murder was abolished ⁴ and, when the alleged murderer was retried in 1994, he was sentenced to the new mandatory sentence of life imprisonment. As the *Manx Independent* noted “Teare is ensured a place in the history books as the last man in Britain sentenced to hang ... And he is the first killer to receive the Island's now mandatory life sentence for murder” ⁵. And the last to undergo the macabre dance of the Isle of Man.

Eventually, this divergence between law and practice became unacceptable to Tynwald. From the available information, it seems likely that the impetus for legal change came from Tynwald rather than, as was the case in the legalisation of male homosexual acts, from the United Kingdom government. The principal motive appears to have been a consideration that the ritual had become a mere charade, bringing discredit upon the Isle of Man.

Given that there was a need to address the divergence between law and practice, which I have already queried, it is open to question whether complete abolition was necessary. While it would have been impossible, and perhaps even inappropriate, for the Manx government to compel the Home Secretary to act against his political interests by exercising a genuine judgement as to whether or not to execute a particular murderer, could it not have been possible to remove the Home Secretary from the process entirely?

¹Consider Mrs. Hannan, Consideration of Clauses, House of Keys, 10 November 1992 (*Manx Debates* 1992, K52).

²Consider Mr. Gilbey, Second Reading, House of Keys, 3 November 1992 (*Manx Debates* 1992, K35); Mr. Radcliffe, Second Reading, Legislative Council, 2 February 1992 (*Manx Debates* 1993, C50). cf. Mr. Groves, Third Reading, House of Keys, 26 January 1993 (*Manx Debates* 1993, K145).

³For a multitude of examples, see the sources cited in footnote 46 above.

⁴Capital Punishment (Abolition) Act 1993 s.1.

⁵See, for a general resume of Teare's retrial, (1994) *Manx Independent* 29 April.

An argument could be put forward, if the Isle of Man really did favour capital punishment, for bringing the prerogative of mercy into the Insular sphere, perhaps under the control of either the senior members of the Manx executive, or a special Board, appointed solely for that purpose. There were plentiful models available from the United States, and this internalisation of powers previously exercised by British officials on behalf of the Crown would seem in accord with other constitutional developments in the Isle of Man. The setting of the agenda as between either abolition or farce may represent less enthusiasm for capital punishment than the reliance on constitutional arguments in Tynwald suggests. Alternatively, it may simply indicate a belief that, even in the relative calm of a period when no death sentence was under consideration, the British Government would not consider allowing any body over which it could exercise some control to countenance capital punishment. If that is the case, the strength of the ties binding the Isle of Man to the United Kingdom have been shown, once again, to lie in constitutional practice, rather than constitutional law.

I will conclude with a revisionist evaluation of the macabre dance. It has been suggested that the ritual of passing sentence knowing it will never be carried is empty formalism, by which I mean a required ritual which serves no purpose. This view can be found in submissions to the British Royal Commission on Capital Punishment ¹, as well as the Manx press ². Throughout the debates in Tynwald the ritual was dismissed as 'nonsense', 'pointless', 'farce', 'a mockery', an 'embarrassment' making the Isle of Man 'a laughing stock' and bringing 'the law itself into dispute' ³.

It is submitted that this view neglects the exact nature of the ritual in question. It is a ritual of *punishment* ⁴. There is support for the simple sentence as punishment from the judgment of the Staff of Government in *Frankland*, the background of which is noted above. In imposing sentence Hytner J.A. took into account:

¹*Royal Commission on Capital Punishment 1949-1953*, (Cmd. 8932, 1953) para. 48 per Archbishop of Canterbury.

²(1992) Isle of Man Examiner 30 June.

³See the sources cited in footnote 45 above.

⁴See, inter alia, S. Sverdlik, 'Punishment', 7 *Law and Philosophy* 1988,179; R.J. Rychlak, 'Society's Moral Right to Punish: A Further Exploration of the Renunciation Theory of Punishment', 65(1) *Tulane Law Review*,

“although you must have been told you were not going to be hanged, you did suffer the unpleasant and probably frightening experience of being sentenced to death, being taken, in a ritual which was long out of date, to the death cell; having your appeal against sentence refused; and being returned again to the death cell before you were finally relieved.”

The fact that the court considered the sentence to be a harm does not necessarily indicate that the convicted person felt it in the same way ¹. But, even if no convicted person ever suffered harm from receiving the sentence of death, it does not erode the status of the ritual as a ritual of punishment, albeit an ineffectual one. It is submitted, however, that receiving sentence of death was itself a harm - a submission which is supported by the analysis of the punishment as denunciation. The criminal trial is about much more than justice to the individual defendant. Rather it is a key defining incident in the creation of societal values - 'those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what society represents' ². By this denunciation society seeks to reinforce its members disapproval of the criminal act and thus reduce its frequency; promote social cohesion; and give satisfaction to those members of society who have refrained from the criminal act out of respect for societal values.

Bearing this in mind, what actually happened when the death sentence was passed on a Manx murderer? They were degraded from the status of a human being with a right to participate in society, albeit in the restricted sense of a prisoner serving a life sentence: to an individual whose life is to be spared, as a privilege granted by an official of a different state - an official unaccountable to the society which has registered its repugnance for the murderer and his deeds. The fact that he is not actually executed is, from a denunciatory viewpoint far more than a retributory one, almost immaterial. As J.H. Bogart noted with a clarity that merits full reproduction:

“The essence of denunciatory theories is the claim that punishment, in particular legal punishment, is an especially emphatic denunciation of the conduct which prompted the legal proceedings. The point of public proceedings is to make undeniable the social reprobation expressed against the wrongdoing. The theory does not *require* incarceration, etc. If a stern rebuke from the bench were sufficient to drive home to both the offender and to the public at large that the behaviour is not to be condoned or accepted, then there

1991, 299; J.H. Bogart, 'Punishment and the Subordination of Law to Morality', 7 *Oxford Journal of Legal Studies*, 1987, 421.

¹Consider *Royal Commission on Capital Punishment 1949-1953*, (Cmd. 8932, 1953) at para. 48 per Sir John Anderson.

²R.J. Rychlak, *op.cit.*, 331.

would be no need for incarceration. Imprisonment on this view is just a further and more emphatic denunciation.”¹

In conclusion, the ritual of capital punishment between 1973 and 1993 was more than empty formalism. It is submitted that the ritual was itself a punishment, a punishment which degraded the status of the murderer, and denounced both him and his act with more potency than mere life imprisonment could afford².

¹J.H. Bogart, op.cit. 426-7.

²Consider also J. Braithwaite, *Crime, Shame and Reintegration*, [Cambridge] 1989.

Afterword.

This brief review of key aspects of Manx Public Law has demonstrated the ever closer legal links between the Manx and the English jurisdictions in the areas discussed. As the historical discussion of Manx criminal law has illustrated, it would be difficult for the most fervent supporter of Manx difference to seek a return to some golden age when Manx law was ‘authentic’ and free from English influence. Early Manx legal records show that any such return would be to legal rules entirely unsuited to modern conditions. Indeed, given the relatively late start of Manx legal literature, even the earliest records bear strong evidence of English and Scots influence.

But, if it is pointless to seek to return to an authentic Manx jurisprudence, it may be possible to develop such a jurisprudence. Advocates and Deemsters may currently have a limited role to play in developing Manx law independently from the law of England, given the strong reliance upon English models in legislation, and the sound reasons why relevant English precedents should be given great weight within the Manx jurisdiction. There is no reason, however, why they should be so restricted in dealing with self-consciously original legislation produced by Tynwald, which without doubt has the authority, and increasingly the will, to depart from English models when crafting legislation for the Manx jurisdiction.

This is not an argument for difference for difference’s sake. There are very sound reasons why a close similarity between English and Manx law is generally desirable, if only in the interests of certainty. Additionally, the limited resources of the Island seem likely to continue to encourage extensive use of the academic, educational, and material resources of its largest neighbour. But there is no reason why Tynwald should not continue to take seriously its role as the Manx legislature, responsible to the inhabitants of the Isle of Man, and depart from English models where local conditions make it desirable.

Appendix: Derivation Table for Criminal Code 1872.

This appendix contains a derivation table the author found useful in his own research into Manx law. There are undoubtedly errors in this table, but they are more likely to be of omission than of commission, and where the table indicates a particular section of Manx legislation is based on an English (or occasionally, Irish) statute, the two sections have been manually compared.

The following information is listed.

One of the following two letters

s - section related primarily to substantive criminal law;

p - section related primarily to criminal procedure;

Followed by one of the four following letters

a - section is an altered form of a United Kingdom provision; o - section is not an altered form of a United Kingdom provision; x - section is an exact copy of a United Kingdom provision; e - section is an altered form of a United Kingdom provision, but the alterations are of no practical importance;

Followed (in cases where the section is UK derived) by date of UK statute/chapter number/section.

CRIMINAL CODE 1872

s.2 so

s.3 so

s.4 so

s.5 so

s.6 so

s.7 po

s.8 sa1848/12/3

s.9 pa1848/12/4

s.10 pa1848/12/5

s.11 sa1797/70/1

s.12 sa1842/51/2

s.13 so

s.15 pa1848/12/7

s.16 sa1819/1/1

s.17 pa1819/1/2

s.18 so

s.19 sa1861/100/4

s.20 so

s.21 pa1861/100/6

s.22 sx1861/100/7

s.23 sa1861/100/11

s.24 sa1861/100/12

s.25 sa1861/100/13

s.26 sa1861/100/14

s.27 sa1861/100/15

s.28 so

s.29 so

s.30 so

s.31 sa1861/100/16

s.32 sa1861/100/17

s.33 sa1861/100/18

s.34 sa1861/100/19

s.35 sa1861/100/20

s.36 sa1861/100/21

s.37 sa1861/100/22

s.38 sa1861/100/23

s.39 sa1861/100/24

s.40 sx1861/100/25

s.41 sa1861/100/26

s.42 sa1861/100/27

s.43 sa1861/100/28

s.44 sa1861/100/29

s.45 sa1861/100/30

s.46 sa1861/100/31

s.47 sx1861/100/34

s.47 sx1861/100/35

s.49 sx1861/100/36

s.50 sa1861/100/37

s.51 sa1861/100/38

s.52 so

s.53 sa1861/100/39

s.54 sa1861/100/40

s.55 sx1861/100/41

s.56 pa1861/100/43

s.57 pa1861/100/45

s.58 pa1861/100/46

s.59 so

s.60 sa1861/100/47

s.61 so

s.62 sx1861/100/49

s.63 sa1861/100/50

s.64 sa1861/100/51

s.65 sx1861/100/52

s.66 sa1861/100/53

s.67 sa1861/100/54

s.68 sx1861/100/55

s.69 sa1861/100/56

s.70 sa1861/100/57

s.71 sa1861/100/58

s.72 sa1861/100/59

s.73 sx1861/100/60

s.74 so

s.75 sa1861/100/62

s.76 sx1861/100/63

s.77 so

s.78 so

s.79 so

s.80 so

s.81 so

s.82 po

s.83 po

s.84 sa1861/97/1

s.85 sa1861/97/2

s.86 sa1861/97/3

s.87 sa1861/97/4

s.88 sa1861/97/5

s.89 so

s.90 sa1861/97/6

s.91 sa1861/97/7

s.92 sa1861/97/8

s.93 so

s.94 sa1861/97/9

s.95 sa1861/97/10

s.96 sa1861/97/11

s.97 sa1861/97/12

s.98 sa1861/97/13

s.99 sa1861/97/14

s.100 sa1861/97/15

s.101 sa1861/97/16

s.102 sa1861/97/17

s.103 sa1861/97/18

s.104 sa1861/97/20

s.105 sa1861/97/21

s.106 sa1861/97/23

s.107 so

s.108 sa1861/97/26

s.109 sa1861/97/27

s.110 sa1861/97/28

s.111 sa1861/97/29

s.112 sa1861/97/30

s.113 sa1861/97/32

s.114 sa1861/97/33

s.115 so

s.116 sa1861/97/35

s.117 so

s.118 so

s.119 sx1861/97/36

s.120 sa1861/97/37

s.121 sa1861/97/38

s.122 sa1861/97/39

s.123 sa1861/97/40

s.124 sa1861/97/41

s.125 sa1861/97/42

s.126 sa1861/97/43

s.127 sa1861/97/44

s.128 sa1861/97/45

s.129 sa1861/97/46

s.130 sa1861/97/47

s.131 sa1861/97/48

s.132 sa1861/97/49

s.133 sa1861/97/50

s.134 sa1861/97/51

s.135 po

s.136 sx1861/97/54

s.137 so

s.138 se1861/96/3

s.139 sa1861/96/4

s.140 pa1861/96/5
s.141 px1861/96/6
s.142 sa1861/96/7
s.143 sa1861/96/8
s.144 sa1861/96/9
s.145 sa1861/96/10
s.146 sx1861/96/11
s.147 sa1861/96/17
s.148 sx1861/96/20
s.149 sa1861/96/21
s.150 sa1861/96/23
s.151 sa1861/96/24
s.152 sa1861/96/26
s.157 sa1861/96/27
s.158 sa1861/96/28
s.159 sa1861/96/29
s.160 sa1861/96/30
s.161 sa1861/96/31
s.162 sa1861/96/32
s.163 sx1861/96/38
s.164 sx1861/96/39
s.165 sa1861/96/40
s.166 px1861/96/41

s.167 sa1861/96/42

s.168 sa1861/96/43

s.169 sa1861/96/44

s.170 sa1861/96/45

s.171 sa1861/96/46

s.172 sa1861/96/47

s.173 sa1861/96/48

s.174 so

s.175 sx1861/96/49

s.176 sa1843/96/3

s.177 so

s.178 sa1861/96/50

s.179 sa1861/96/51

s.180 sa1861/96/51

s.181 sa1861/96/52

s.182 sx1861/96/53

s.183 sa1861/96/54

s.184 sa1861/96/55

s.185 sa1861/96/56

s.186 sa1861/96/57

s.187 sa1861/96/58

s.188 sa1861/96/59

s.189 sa1861/96/60

s.190 sa1861/96/61

s.191 sa1861/96/62

s.192 sa1861/96/63

s.193 sa1861/96/64

s.194 so

s.195 sa1861/96/65

s.196 sa1861/96/66

s.197 sa1861/96/67

s.198 sa1861/96/68

s.199 sa1861/96/69

s.200 sa1861/96/70

s.201 so

s.202 sa1837/36/25

s.203 sa1837/36/26

s.204 sa1837/36/27,28,29

s.205 sa1837/36/30

s.206 sa1837/36/31

s.207 pa1837/36/40

s.208 so

s.209 px1861/96/71

s.210 pa1861/96/72

s.211 sa1861/96/74

s.212 sa1861/96/75

s.213 sa1861/96/76
s.214 sx1861/96/77
s.215 sx1861/96/78
s.216 sx1861/96/79
s.217 sa1861/96/80
s.218 sx1861/96/81
s.219 sx1861/96/82
s.220 sx1861/96/83
s.221 sa1861/96/84
s.222 px1861/96/85
s.224 sa1861/96/88
s.225 sa1861/96/89
s.226 sa1861/96/90
s.227 sa1861/96/91
s.228 px1861/96/92
s.229 px1861/96/93
s.230 px1861/96/94
s.231 sx1861/96/95
s.232 pa1861/96/96
s.233 pa1869/99/11
s.234 pa1871/112/19
s.235 pa1869/99/11
s.236 sa1861/97/97

s.237 sa1861/96/99

s.238 sa1861/96/100

s.239 sa1861/96/101

s.240 sa1861/96/102

s.241 sa1861/98/1

s.242 sa1861/98/3

s.244 so

s.245 sa1861/98/4

s.246 sa1861/98/7

s.247 sa1861/98/8

s.248 sa1861/98/9

s.249 sa1861/98/10

s.250 sa1861/98/11

s.251 sa1861/98/12

s.252 sa1861/98/13

s.253 sa1861/98/14

s.254 sx1861/98/15

s.255 sa1861/98/16

s.256 sa1861/98/17

s.257 sa1861/98/18

s.258 sa1861/98/19

s.259 so

s.260 sa1861/98/20

s.261 sa1861/98/21

s.262 sa1861/98/22

s.263 sa1861/98/23

s.264 so

s.265 sa1861/98/24

s.266 sa1861/98/25

s.267 sa1861/98/26

s.268 sa1861/98/27

s.269 sa1861/98/28

s.270 sa1861/98/29

s.271 so

s.272 sa1861/98/30

s.273 sa1861/98/31

s.274 sa1861/98/32

s.275 sa1861/98/34

s.276 sa1861/98/35

s.277 sa1861/98/36

s.278 sa1861/98/37

s.279 sa1861/98/38

s.280 sx1861/98/39

s.281 sa1861/98/40

s.282 px1861/98/42

s.283 px1861/98/43

s.284 sx1861/98/44

s.285 sx1861/98/45

s.286 pa1861/98/46

s.287 sx1861/99/1

s.288 sa1861/99/2

s.289 sa1861/99/3

s.290 sa1861/99/4

s.291 sa1861/99/5

s.292 sa1861/99/6

s.293 sa1861/99/7

s.294 sa1861/99/8

s.295 sa1861/99/9

s.296 sa1861/99/10

s.297 sa1861/99/11

s.298 sa1861/99/12

s.299 sa1861/99/13

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